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Supreme Court, U.S.
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In The
**Supreme Court of the United States**

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ALEKSANDR J. STOYANOV and
YURI J. STOYANOV,
*Petitioners*

v.

DONALD C. WINTER,
SECRETARY OF THE NAVY; ET. AL.,
*Respondents.*

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On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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Aleksandr J. Stoyanov,
Yuri J. Stoyanov
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Road
Fulton, MD 20759

## QUESTIONS PRESENTED FOR REVIEW

Petitioners seek decision to vacate the appeals court decision, which did not address any issue raised by Petitioners, but sanctioned wrong district court opinions that conflict and so far depart from this Court's decisions as to call for an exercise of this Court's supervisory power. The wrong and erroneous reasons stated in the district court opinions and orders dismissing Petitioners' consolidated cases present the following questions:

1. Whether Petitioners created a jury question with direct evidence of age discrimination and presented strong evidence of intentional age discrimination according to decisions of this Court and the appeals court's own decisions to satisfy demand for a jury trial?

2. Whether Petitioners created a jury question by providing evidence of disparate treatment and intentional discrimination on bases of national origin to satisfy demand for a jury trial.

3. Whether Petitioners created a jury question by presenting evidence of retaliations for participation in protected activities evident throughout the entire course of events?

4. Whether Petitioners were required to explicitly identify 42 U.S.C §1983 in the civil action complaints for claims concerning the liability of the individual defendants.

5. Whether a cause of action and a damages remedy can also be applied directly against individual Defendants under 42 U.S.C §1983 for deprivation of Petitioners' rights granted by federal laws.

## LIST OF PARTIES

ALEKSANDR J. STOYANOV and
YURI J. STOYANOV,
Petitioners,

v.

DONALD C. WINTER, Secretary of the Navy;
GARY M. JEBSEN, individually and in his official capacity as Head of Code 70, Carderock Division Naval Surface Warfare Center;
JAMES H. KING, individually and in his official capacity as Head of Code 74, Carderock Division Naval Surface Warfare Center;
JOHN C. DAVIES, individually and in his official capacity as Deputy Head of Code 74, Carderock Division Naval Surface Warfare Center;
STEPHAN M. FARLEY, individually and in his official capacity as Head of Code 741, Carderock Division Naval Surface Warfare Center;
DAVID M. CARON, individually and in his official capacity as Assistant Counsel Code 39, Carderock Division Naval Surface Warfare Center;
Respondents.

## CERTIFICATE OF INTEREST

The Petitioner Aleksandr J. Stoyanov and Yuri Stoyanov certify the following:

1. The full name of every party or amicus represented by us is: None
2. The name of the real party in interest represented by us is: None
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by us are: None
4. There is no such corporation as listed in paragraph 3
5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this court are: None

7/21/08
Date

Aleksandr Stoyanov
Aleksandr Stoyanov

Yuri Stoyanov
Yuri Stoyanov

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## OPINIONS BELOW

1. U.S. Court of Appeals for the Fourth Circuit, Docket No. 07-1969, (1:05-cv-01567-RDB, 1:05-cv-01611-RDB) Order denying Appellants' petition for rehearing and rehearing en banc, April 28, 2008. (Appendix page A1)

2. U.S. Court of Appeals for the Fourth Circuit, Docket No. 07-1969, (1:05-cv-01567-RDB, 1:05-cv-01611-RDB) Judgment decided on February 25, 2008. (Appendix p. A2)

3. U.S. Court of Appeals for the Fourth Circuit, Docket No. 07-1969, (1:05-cv-01567-RDB, 1:05-cv-01611-RDB) February 25, 2008 Opinion to affirm the district court's orders dismissing Petitioners' claims for the reasons stated by the district court is unreported. (Appendix p. A3)

4. U.S. District Court Order and Judgment dated August 15, 2007, Docket No. 05-01567-RDB and 05-01611-RDB (Appendix p. A5)

5. U.S. District Court Memorandum Opinion dated August 15, 2007, Docket No. 05-01567-RDB and 05-01611-RDB. (Appendix p. A6)

6. U.S. District Court Memorandum Opinion dated July 25, 2006, Docket No. 05-01567-RDB and 05-01611-RDB. (Appendix p. A51)

7. U.S. Court of Appeals for the Fourth Circuit, Docket Nos. 07-1969, (1:05-cv-01567-RDB, 1:05-cv-01611-RDB) Informal Brief dated October 27, 2007. (Appendix p. A89)

8. U.S. Equal Employment Opportunity Commission Decision, Appeal Nos. 01A40609, 01A40640, Aleksandr J. Stoyanov, Yuri J. Stoyanov, Complainants v. Gordon R. England, Secretary, Department of the Navy, Agency; Agency Nos. DON-

02-00167-03, DON-02-00167-002; Hearing Nos. 120-2003-00020X, 120-2003-00031X; (Appendix p. A157)

9. Affidavit of Aleksandr J. Stoyanov. (Appendix p. A178).

## JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit issued Orders denying timely petition for rehearing en banc on April 28, 2008 for Petitioners Aleksandr Stoyanov and Yuri Stoyanov. Petitioners join in a petition for a writ of certiorari under this Court's Rule 12.4. The Supreme Court has jurisdiction in exercising its power of review of this matter pursuant to 28 U.S.C. 1253-1254. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

## STATUTES INVOLVED IN THIS CASE

Age Discrimination in Employment act of 1967, 29 U.S.C. 621 et seq. ("ADEA"); Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e et. seq. ("Title VII"); Whistleblower Protection Act, 5 U.S.C. 2302(b)(8) ("WPA"); 5 U.S.C. §§2301-2302; 42 U.S.C. §1983.

## STATEMENT OF THE CASE

Petitioners Dr. Aleksandr Stoyanov and Dr. Yuri Stoyanov[1] submit for the Court's consideration and decision to vacate and remand the appeals court decision, which sanctioned a decision by a lower court that conflicts and so far departs from this Courts' decisions as to call for an exercise of this Court's supervisory power. The appeals court for the fourth circuit did not address any issue raised by

[1] Petitioners are twin brothers 53 years old and were born in Russia.

Petitioners, but sanctioned wrong and erroneous reasons stated in the district court opinions that conflict with the relevant decisions of this Court and decisions of other appeals courts. Facts presented below support Petitioners' cause because:

1) Both Petitioners have exhausted all administrative and legal remedies for intentional age discrimination and retaliations against Petitioners. As a last resort for legal remedies, Petitioners appeal to this Court to exercise supervisory power and restore justice because of clear evidence of blatant age discrimination, intentional retaliations against Petitioners, and corruption of the process.

2) Petitioners worked for the Navy as career appointment Scientists in the same Code 741, RF Technology Branch, since 1989. On February 4, 2002, both Dr. Aleksandr Stoyanov and Dr. Yuri Stoyanov filed first EEO discrimination complaint after promotion was denied to the ND-5 Branch Head Interdisciplinary Manager position in Code 741 in the most egregious act of intentional discrimination against Petitioners (DOB 4/7/1955, born in Russia) when a significantly younger (over 14 years) with far inferior qualifications Defendant Mr. Farley (DOB 5/16/1969, born in Kansas) was promoted by selecting official manipulating selection process using his subordinates. The selecting official pre-selected and assigned the 29 year-old Defendant Farley to the position in Code 741 in April 2000.

3) Petitioners were also denied promotions and assignments to at least six ND-5 positions, which were filled without any vacancy announcements when other individuals with inferior qualifications were assigned to a position and secretly promoted under pretext of accretion of duties to cover up

intentional age discrimination against Petitioners. The few positions competed through vacancy announcements were also filled by fraud to deny Petitioners promotion. Petitioners were denied promotions and assignments to at least eleven (11) ND-5 positions while younger employees with inferior qualifications were promoted because of age discrimination against Petitioners by the second-level supervisor Defendant King who was about the same age as Petitioners.

4) Since February 4, 2002, after Petitioners filed first EEO discrimination complaints, Defendants immediately conspired to escalate discrimination and retaliations against both Petitioners and changed Petitioner's work schedule on the same day as the EEO Counselor contacted Defendants on February 21, 2002.

5) One month later, after Petitioners filed formal EEO discrimination complaints in March 2002, Defendants again escalated discrimination and retaliations and by fraud transferred Petitioner Dr. Yuri Stoyanov to another technology department from the department where he worked for over fifteen years. Petitioners filed additional EEO discrimination complaints and reported violations of laws through the chain of Navy command and to US Office of Special Counsel (OSC) in May 2002.

6) Defendants escalated discrimination and retaliations against Petitioners for participation in prior EEO discrimination complaint activities and Whistleblowing. The individual Defendants conspired to deny Petitioners promotion to ND-5 positions and retaliated against Petitioners by excluding Petitioners from managing projects, denied directly funded work, interfered with Petitioners'

projects, assigned tasks incompatible with professional duties, imposed discriminatory requirements, redirected funding, used threats of disciplinary action, denied transfer, incentive pay, and purchase of a work-related computer. Defendants intentionally escalated discrimination and retaliations against Petitioners by aggravating harassment and creating hostile working environment to harm Petitioners because agency officials failed to take immediate remedial measures to end discrimination and retaliations against Petitioners. Defendants conspired to corruptly influence, obstruct, and impede administrative process in order to obfuscate egregious age discrimination in violations of EEO Commission regulations and Federal laws and to injure Petitioners.

7) In September 2003, the EEOC Administrative Judge found that the agency committed intentional discrimination against the Petitioner Dr. Aleksandr Stoyanov in reprisal for prior EEO activity. However, the agency failed to comply with laws and failed to implement the Navy policy of zero tolerance to discrimination. As a result of agency's failure to comply with laws and the Navy policy, Defendants further escalated discrimination and unlawfully removed the Petitioner Dr. Aleksandr Stoyanov from the Scientist position in October 2003. Petitioners filed over twenty additional EEO discrimination complaints each, disclosed violations of laws, abuse of authority, violations of the Whistleblower Protection Act through the chain of Navy command, and filed disclosures with the US Office of Special Counsel and appeals with the Merit Systems Protection Board.

8) In 2004, the EEOC Administrative Judge again found that Defendants discriminated against the Petitioner in another EEOC discrimination case. On March 29, 2005, the EEO Commission Office of Federal Operations (EEOC-OFO) upheld found discrimination against the Petitioner in the first EEOC case and ordered the agency to take appropriate disciplinary action against the responsible management officials. However, agency again failed to comply with laws and implement the Navy policy of zero tolerance to discrimination.

9) In June 2005, Petitioners filed civil actions against the Defendants individually and in their official capacity to recover damages and restore justice because of egregious discrimination and violations of Petitioners' rights. Since formal EEO discrimination complaints were filed in 2002, there was no hearing on the crucial age discrimination claims, which were easy to prove, but dismissed without a hearing since EEOC level to Circuit Court because individual Defendants conspired to provide false and misleading information, corruptly influenced, obstructed and impeded due and proper administration of the law. The district court judge abused discretion and wrongly dismissed the crucial age discrimination claims for denied promotion and claims against individual Defendants after delays of more than a year. And after another year of intentional delays, the district court wrongly dismissed all claims in August 2007.

10) The U.S. Court of Appeals for the Fourth Circuit did not address any issue raised by the Petitioners' appeal (see Informal Brief, Appendix at A90) but sanctioned wrong and erroneous reasons stated in the district court opinions based on abuse of

discretion and Defendants' intentional material misrepresentations and fraud. The appeals court decision and the district court opinions so far departed from this Courts' decisions as to call for an exercise of this Court's supervisory power to restore justice and issue a decision in favor of Petitioners or remand the case for a jury trial.

## ARGUMENTS FOR ALLOWANCE OF THE WRIT

### PETITIONERS CREATED A JURY QUESTION WITH THE EVIDENCE OF AGE DISCRIMINATION CLAIMS

Petitioners appeal and present compelling reasons to grant petition for a writ of certiorari based on the relevant decisions of this Court. In *Reeves v. Sanderson Plumbing Products, Inc, 530 U. S. 133, 140 (2000)*, this Court established what showing a plaintiff had to make regarding pretext in the age discrimination case and, specifically, whether a plaintiff could satisfy his burden by merely rebutting the defendant's explanation for the action. The appeals court for the fourth circuit also had applied the *Reeves* methodology to allow a plaintiff to survive summary judgment and sustained a jury verdict for plaintiff in the failure to promote case; it had done so where the plaintiff had shown the *prima facie* evidence in creating an inference of discrimination. See *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d at 649-50 (4th Cir. 2002). The appeals court held that "the *Reeves* formulation operates based on "the strength of the prima facie evidence in creating an inference of discrimination." *Id* at 648. Petitioners clearly established strong *prima facie* case of age discrimination in this case. In fact, the EEO Commission found that Petitioners "established

a prima facie case of age, national origin and reprisal discrimination" for most of the Petitioners' claims. See EEOC Decision in Appendix at A164. However, the district court abused discretion and far departed from accepted decisions by "conclud[ing] that Plaintiffs have failed to establish the fourth prong of the prima facie test, i.e., that Plaintiffs were rejected for the position under circumstances giving rise to an inference of unlawful discrimination" contrary to the accepted decisions, the facts, and the evidence of intentional age discrimination when Petitioners specifically challenged the selection process since the position was filled by a significantly younger (more than 14 years) 32=year-old Defendant Farley far less qualified than Petitioners and addressed the issue in the Plaintiffs' Opposition. See 7/25/06 Opinion in Appendix at A86 and Informal Brief at A104. The appeals court did not address this issue of intentional age discrimination and sanctioned a departure of a lower court from the accepted decisions that call for an exercise of this Court's supervisory power.

The appeals court decision also sanctioned a departure of a lower court from the accepted decision of this Court in *Watson v. Fort Worth Bank and Trust, 487 U.S. 989 (1988)*, concluding that "[e]mployer's undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why [ADEA and] Title VII's proscription against discriminatory actions should not apply. In both circumstances, the employer's practices may be said to adversely affect an individual's status as an employee, because of such individual's ... [age], national origin," or

opposition to discrimination. Petitioners were the most qualified with over 12 years of experience in the RF Technology branch while significantly younger (by more than 14 years) Defendant Farley had no such qualifications and experience and was placed in the branch to deny Petitioners promotion because of intentional age discrimination. The clear focus of the *Watson* opinion is not the degree to which subjective discretion is tolerated, but instead the subjective criteria in the selection can have deleterious effects that are indistinguishable from intentionally discriminatory practices. Furthermore, this Court has already found that an employee's claimed superior qualifications for the position sought could show that the employer's articulated reasons were pretextual. See *Ash* v. *Tyson Foods, Inc.*, 126 S. Ct. 1195 decided on February 21, 2006.

The appeals court decision sanctioned a major departure of a lower court from the EEO decision specifically finding: "with regard to [A. Stoyanov's] claims 1-4, 7-9 and 15 and [Y. Stoyanov's] claims 1-3, 6 and 8-11, the AJ concluded that complainants established a *prima facie* case of age, national origin and reprisal discrimination. ... We agree with this finding." See EEOC Decision in Appendix at A164. The EEOC also found: "[t]he record shows that complainants, [...] highly trained, experienced and professionally recognized," however, based its decision on Defendants' fabrications and lies that Petitioners

> "have had problems in the workplace unrelated to their age, national origin or protected activity. The record indicates that complainants are unable to produce timely projects, cannot maintain the projects within budget, do not

> work well with others, and are unwilling to expand their understanding of how their day-to-day work relates to Navy operations in general. The agency explained that the people they chose for the positions were simply better able to handle managerial tasks than complainants. Complainants, in turn, argue that their qualifications are plainly superior to the selectee's." *Id* at A166.

Petitioners submitted specific evidence establishing that Defendants fabricated pretext based on lies and perjuries for the purposes of litigation that was sufficient to permit the court to infer that Defendants were dissembling to cover up intentional discrimination against the Petitioners. Petitioners submitted affidavits showing that Defendants had conspired to commit perjuries during the administrative investigation, specifically:

> "[Defendants] Mr. King and Mr. Farley lied that I was unable to maintain projects within budget, did not work well with others and produce timely reports. Contrary to Mr. King and Mr. Farley lying and committing perjuries during OCI investigation and depositions, Mr. Davies recommended me for the position at ONR (Office of Naval Research) stating that my ability to manage and coordinate the technical and administrative aspects of S&T (Science and Technology) and RDT&E (Research, Development, Test & Evaluation) programs and my knowledge, skills, ability, or personal characteristics exceed expectations to such an extent that it warrants special mention for placement consideration. Mr.

> Davies was my first level supervisor for about 7 years when he made the recommendation in 2000. In addition, Mr. Davies stated that I have demonstrated the knowledge, skill, ability, or personal characteristics to a degree that is clearly above that expected of a fully competent employee with regard to knowledge of overall Department of the Navy S&T process, knowledge of DOD acquisition process, and ability to communicate technical information in writing and orally in presentations and briefings to flag rank, SES-level and above. For more than 12 years working for the Navy, I always received favorable performance evaluations. In addition, I received performance and service awards for exemplary performance and outstanding achievements." See Affidavit of Petitioner A. Stoyanov, Appendix at A190 ¶42

In addition, Petitioners presented direct evidence of the selecting official's discriminatory attitude based on Petitioners' age. The March 2000 email of the 46-years old selecting official Defendant King about "real paucity of employees in the 26 to 36 year age bracket," distress for being above the average age of 44, and "need for fresh ideas and enthusiastic energy of new employees" was direct evidence of Defendant King's discriminatory attitude because "direct evidence would be what [the selecting official] said or did in the specific employment decision in question." See *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997); Appendix at 184 ¶25. In fact, age discrimination and fraud with the selection process were blatant when Defendant King did not select the highest ranked candidate (Mr. W.

Stephens), but selected the youngest and the least qualified Defendant Farley. See Appendix at A190 ¶40.

A departure of a lower court from the accepted decisions with regard to the direct evidence of age discrimination and discriminatory attitude based on Petitioners' age were misconstrued in the district court 7/25/06 Memorandum of Opinion at A75: "[f]irst, this email was sent well before Plaintiff first sought EEO counseling on February 4, 2002," contrary to the undisputed evidence that the email was sent within a month of assigning the 29-years old Defendant Farley with inferior qualifications to the acting Branch Head position while denying the position to 45-years old Petitioners in April 2000. Neither the appeals court nor the district court addressed the claim of denied position as acting Branch Head that was at issue during administrative processing and was part of the pattern and practice of age discrimination against Petitioners. Moreover, admissibility of age-biased comments made five years earlier by decision-maker was upheld in *Roebuck v. Drexel Univ.*, 852 F.2d 715, 733 (3d Cir. 1988).

Petitioners also presented ample evidence of a pattern and practice of age discrimination against them as a series of secret and fraudulent promotions under the pretext of "accretion of duties" of younger employees with inferior qualifications than Petitioners' qualifications. The undisputed evidence of a series of denied promotions and assignments to the positions leading to promotion established disparate treatment and intentional age discrimination against Petitioners because fraudulent promotions under the "accretion of duties"

were unknown to Petitioners and were made secretly in violation of agency own regulations specifically requiring that "[t]he potential for future promotion must be made known to all potential applicants". See Appendix at A95 ¶19. The appeals court did not address the issue of the pattern and practice of intentional age discrimination against Petitioners, but sanctioned a departure of a lower court from its own decision in *Lowery v. Circuit City Stores, Inc.*, 158 F.3d at 760-61 (4th Cir. 1998), that an individual plaintiff may "use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination within the McDonnell Douglas framework."

In addition, the appeals court sanctioned a departure of a lower court from its own decision and was in conflict with a relevant decision in *Williams v. Giant Food Inc,* 370 F.3d 423 (4th Cir. 2004) that reversed the district court's summary judgment concluding that *Williams* created a genuine issue of material fact relevant to her failure-to-promote claims and can establish a prima facie case if she can show that she was unaware of the promotion opportunities because the company did not follow its own policy. Petitioners did not know about the series of secret and fraudulent promotions. See Appendix at A185 ¶29-31. The pattern and practice of intentional age discrimination against Petitioners evident throughout the entire course of events created a jury questions with regard to material facts[2] related to

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[2] In the 7/25/06 Memorandum Opinion at A65, the district court found that Defendants "neither challenge Plaintiffs' affidavit nor argue the allegations contained in those affidavits are insufficient...".

denial of promotion and assignments to positions leading to promotion.

The pattern and practice of intentional discrimination against Petitioners combined with the direct evidence of age discrimination and the discriminatory comments highly relevant to the existence of discriminatory attitude and intent of the 46-year-old selecting official Defendant King that were clearly probative of whether selecting official harbored the discriminatory motive towards the 45-year-old Petitioners.

Further, Petitioners presented undisputed evidence of disparate treatment because of Petitioners' age and national origin. This Court also held in *Smith v. City of Jackson*, 544 U.S. 228 (2005), that ADEA authorizes recovery on disparate impact claims, comparable to the claim established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which announced a disparate impact theory of recovery under Title VII cases. The EEOC decision specifically addressed the issue of Petitioners' disparate treatment at A171 footnote 4:

> "...the AJ determined, and we agree, that the [computer] incident [as evidence of harassment] did state an independent disparate treatment claim involving the terms and conditions of complainant's employment upon which relief could be granted."

However, the district court ignored the evidence of disparate treatment, misconstrue the pattern and practice of age discrimination in a series of fraudulent promotions of younger employees with inferior qualifications than Petitioners' qualifications, and dismissed the direct evidence of age discrimination and the intent to discriminate

combined with comments that were highly relevant to the existence of discriminatory attitude clearly probative of the selecting official's discriminatory motive towards Petitioners. The appeals court did not address these issues and sanctioned a departure of a lower court from the accepted decisions regarding direct evidence of discriminatory and hostile attitude based on Petitioners' age that "can be interpreted as an acknowledgment of discriminatory intent by the defendant or its agents." *Troupe v. May Dep't Stores*, 20 F.3d 734, 736 (7th Cir. 1994). Accordingly, Petitioners respectfully request an exercise of this Court's supervisory power to restore justice.

PETITIONERS CREATED A JURY QUESTION OF NATIONAL ORIGIN DISCRIMINATION

The appeals court did not address the issue of intentional discrimination against Petitioners on bases of national origin either and sanctioned a departure of a lower court opinion "that Plaintiffs have failed to demonstrate that the legitimate, non-discriminatory reason proffered by the Navy is pretext for discrimination" contradicting undisputed evidence presented by Petitioners clearly establishing that Defendant King connected with the decision making process intentionally excluded Petitioners from department largest programs Billy Goat and the special access programs because of Petitioners' national origin. Petitioners were highly qualified, were holding Top Secret security clearances, requested assignment, and were eligible to be "signed in" to work on the special access programs, but were denied assignments to work on the special access programs because of Petitioners' national origin. See Affidavit of Petitioner A.

Stoyanov, Appendix at A181 ¶17. Although, the district court concluded that Petitioners established a *prima facie* case of discrimination on bases of national origin, the district court misrepresented the issue in the opinion at A85 footnote 20 as "review a decision to deny security clearance" contrary to the facts and evidence that Petitioners were never denied a security clearance and clearly proved intentional discrimination on bases of national origin because Defendant King lied, contradicted facts, and committed perjuries with regard to denied assignments to the special access projects. Petitioners proved that Defendant King proffered pretext when Defendant King lied that it was not his decision to deny Plaintiffs assignments to work on special access programs. See Informal Brief at p. A99-101. Petitioners made out a strong *prima facie* case of national origin discrimination and offered ample evidence to discredit Defendants' proffered reasons for failure to assign Petitioners to positions of higher responsibility in the special access programs because of intentional discrimination on bases of national origin. The district court clearly abused discretion and departed from accepted decisions of this Court. Accordingly, Petitioners call for an exercise of this Court's supervisory power because appeals court sanctioned clear departure of the lower court from its own decision in *EEOC v. Sears Roebuck & Co.* 243 F.3d 846 (4th Cir. 2001) that reversed a grant of summary judgment in favor of the employer after applying the *Reeves* formulation.

## PETITIONERS CREATED A JURY QUESTION WITH THE EVIDENCE OF RETALIATION CLAIMS

The appeals court decision did not address any issue with respect to retaliation claims raised by Petitioners, but sanctioned wrong district court opinions that conflicted and so far departed from this Court's decision in *Burlington N. & S.F. Ry. v. White, 26 S. Ct. 2405, 2415 (2006 )* as to call for an exercise of this Court's supervisory power. Petitioners were denied promotions while significantly younger S. Russell and J. Young with far inferior qualifications were promoted by fraud and manipulations of the selection process to retaliate against Petitioners for participation in protected activities. In addition, Defendants retaliated against Petitioners intentionally changing Petitioners' work schedule on February 21, 2002; deliberately terminated Petitioner Dr. Y. Stoyanov's 16-years career in Radar Frequency Technology Code 74 and by fraud transferred Petitioner to another technology department shortly after filing first EEO discrimination complaint; denied Petitioners assignment to the ND-5 Chief Scientist position; denied work on funded projects available in department Code 74; aggravated harassment and created hostile work environment by assigning tasks incompatible with Petitioner's professional duties to humiliate and to create intolerable working conditions in malicious attempt to provoke non-compliance with clearly discriminatory assignments; ordered Petitioner to provide a written communication to summarize each day of work; denied Petitioner directly funded project and denied request for transfer back to Code 74 to work on the funded project Petitioner proposed and received from

outside sponsors; excluded Petitioners from managing projects; intentionally excluded Petitioners' job series 1310-Physicist from vacancy announcements, did not assign Petitioners to positions of higher responsibility and denied career ladder opportunities to deny Petitioners promotions and opportunity to reach true potential at the agency; denied incentive pay demo points; deliberately interfered with Petitioner's work; denied travel; and denied a computer needed for Petitioner's work. Petitioners established strong *prima facie* cases of intentional discrimination and retaliations under ADEA, Title VII, and WPA. Without question the anti-retaliation provisions are violated whenever the employer responds to protected activity in such a way that a reasonable employee would have found the challenged action materially adverse. See *White, 26 S. Ct. at 2415.* Petitioners presented ample evidence of intentional retaliations because of Petitioners' participation in prior EEO and Whistleblowing activities and proved causation by looking at the evidence as a whole because "[a] discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990). Petitioners also identified direct evidence of Defendant's intent to continue intentional discrimination and retaliations in Defendant Jebsen's July 29, 2002 Email: "... I don't like the sound of mediation; implies we have some grounds for compromise;" and direct evidence of Defendant's conspiracy to escalate discrimination, retaliations, abuse of authority, and violations of laws when on September 30, 2002, Defendant Jebsen instructed his subordinates: "It's time to crack down

on them [Stoyanovs]...Dave Caron has mentioned it twice now. What do you recommend?" See Appendix at A194 ¶52-53.

The undisputed evidence in the record established that Defendants retaliated against Petitioners for opposing discrimination since 2000 and for participation in EEO discrimination complaint process and Whistleblowing activities since 2002. Petitioners established strong *prima facie* cases of retaliations and proved the causal connection because of close temporal proximity between Petitioners protected activities and the adverse employment actions against Petitioners. The direct evidence of intent and conspiracy to escalate retaliations, found retaliation during administrative processing of the EEO discrimination complaints, the pattern and practice of intentional discrimination and retaliations against Petitioners created an inference of retaliations and proved causation by looking at the evidence as a whole in addition to showing that Defendants proffered pretext unworthy of credence. However, the district court opinions conflicted and far departed from accepted and usual course of judicial proceedings by granting Defendants' motion for summary judgment contrary to the direct evidence of a systematic policy and practice of discrimination and retaliations, failure to take immediate remedial measures, and a series of related acts of intentional discrimination, hostile work environment, and retaliations against Petitioners in addition to found intentional retaliation during administrative processing of the Petitioners' EEO discrimination complaints. Accordingly, Petitioners respectfully request for an exercise of this Court's supervisory power to restore

justice because appeals court sanctioned the lower court unjust decision and clearly departed from this Court's decision in *White*.

CLAIMS AGAINST INDIVIDUAL DEFENDANTS

Also, the appeals court decision did not address any issue with respect to claims against individual Defendants raised by Petitioners, but sanctioned wrong district court opinions that conflicted and far departed from this Court's decision in *Swirkiewich v. Sorema N. A., 534 U.S. 506, 513 (2002)*. The district court clearly abused discretion and erroneously dismissed claims against individual Defendants by stating in the 7/25/06 Memorandum Opinion at A63: "[f]irst, Plaintiffs do not assert causes of action under §1983 in their complaints" that contradicted this Court's decision because a complaint need only satisfy the "simplified pleading standard" of Rule 8(a). See *Id* at 513. In addition, the district court abused discretion and denied Plaintiffs' requests to amend the complaints and include §1983 as the causes of action. Petitioners already identified in the complaints individual Defendants "acting under color of law" and Defendants' violations and illegal acts that deprived Petitioners of constitutional rights and rights as set in Federal laws and specifically 5 U.S.C §2302 and 5 U.S.C § 2301. The federal district courts already had jurisdiction over individual Defendants granted by 28 U.S.C. 1343(3). Moreover, complaints "need not plead law or match facts to every element of a legal theory." *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000)(quoting *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998)). Petitioners identified in the complaints individual Defendants "acting under color of law" and claimed individual Defendants'

conspiracy[3] to commit perjuries, fraud, and deceptions to deprive Petitioners of constitutional rights, and to cause Petitioners severe injury to reputation in the community, mental and physical pain, anxiety, and economic damages. Petitioners brought civil actions and tort claims against individual Defendants under the authority of *Bivens v. Six Unknown Named agents of FBI, 403 US 388 (1971)* for damages arising from intentional violations of Petitioners' rights guaranteed by the Constitution and federal laws.

This Court already affirmed that "Section 1983 provides a cause of action for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." See *Gomez v. Toledo, 446 U.S. 635 (1980).* However, the district court departed from this Court's decision and clearly abused discretion in the 7/25/06 Memorandum Opinion stating at A63: "[s]econd, the allegations in Plaintiffs' Complaints are noting more than allegations of employment discrimination" contrary to the claims of violations of Petitioner's rights guaranteed by the Constitution and federal laws, when individual Defendants conspired to violate laws and regulations, committed fraud and deliberate misrepresentations, obstructed official process, abused authority, administrative power, and administrative process by aiding and abetting violations of civil rights laws, Petitioners' rights, and

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[3] In fact, Plaintiffs identified direct evidence of Defendants' conspiracy to escalate violations of Petitioners' rights, laws, abuse of authority, and discrimination; See Appendix at A118, A202.

intentionally inflicting emotional distress and economic damages against Petitioners. Individual Defendants have violated Petitioners' rights under the Constitution and federal laws, and Petitioners have no effective legal means other than the judiciary to vindicate these rights. "When section 1983 is used as a parallel remedy for violation of section 703 of Title VII [42 U.S.C. 2000e], the elements of the two causes of action are the same." *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 n. 16 (11th Cir. 1982).

Petitioners' complaints concern the liability of the individual Defendants, Jebsen, King, Davies, Farley, and Caron as agency officials acting "under color of law" to deprive Petitioners of rights granted by federal laws[4]. This Court clearly established that such officials are liable if their actions or orders violate constitutional rights and laws because the statute, 42 U.S.C §1983, reflects a congressional judgment that a "damages remedy against offending party is a vital component of any scheme for vindicating cherished constitutional guaranties." See *Owen v. City of Independence, 445 U.S. 622, 636 (1980)*. The district court clearly abused discretion and far departed from accepted and usual course of judicial proceedings substituting United States instead of individual Defendants for depriving Petitioners of rights granted by federal laws because suits for damages against officials in their individual

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[4] The district court abused discretion and wrongly dismissed claims based on 5 U.S.C. §§2301-2302 by partially quoting prohibited personnel practices related to discrimination (see footnote 17 in the Memorandum Opinion §V. B.) while §2302(b)(4), (6), (8), (9), (10), (12) were omitted and §2301(b)(1), (5), (6), (8), (9) not mentioned, that established individual Defendants' violations of federal laws specifically securing Plaintiffs' rights, privilege, or immunity.

capacities are valid. See *D'Aguano v. Gallagher, 50 F.3d 877, 879, (1995).*

The evidence in the record established that Defendants conspired to violate Petitioners constitutional rights and rights granted by the federal laws. Individual Defendants conspired to commit fraud and deliberate misrepresentations by aiding and abetting violations of civil rights laws. Individual Defendants violated laws, abused authority, obstructed official process, and intentionally inflicted emotional distress and economic damages against Petitioners. Sufficient precision and factual specificity of individual Defendants' violations of Petitioners' rights raised genuine issues under the 42 U.S.C §1983 as to the illegality and liability of individual Defendants' conduct. The undisputed evidence[5] of Defendants conspiracy to violate Petitioners' rights, federal laws, and intentional retaliations based on individual Defendants' lies and deliberate misrepresentations for the purposes of litigation clearly established harm and damages suffered by Petitioners because agency appeals and endless administrative battling of intentional discrimination and retaliations led to further escalation of discrimination and retaliations against Petitioners that continuously deplete the spirit along with the purse. Petitioners requested remedy that looks at the course of dealing with Defendants' violations as a whole, not simply as so many individual incidents because the whole here is far greater than the sum of its parts. However, the district court abused discretion[6] by weighing

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[5] See Affidavit of Aleksandr Stoyanov in Appendix at pp. A178-A211.

[6] For additional abuse of discretion see Informal Brief in Appendix at pp. A89-A157

evidence and drawing inferences with regard to the crucial issue of egregious age discrimination for denied promotion by stating in 6/25/06 Opinion at A87: "... Plaintiffs also rely on the deposition testimony of various individuals, including King and Farley. The specific deposition testimony cited by Plaintiffs, however does not support any reasonable inference that the Navy's proffered legitimate, non-discriminatory reasons is pretext" contrary to this Court's decisions in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), holding that making credibility determinations and weighing any evidence along with the drawing of legitimate inferences from the facts, are for the jury, not the court in addition to the finding in *Ash* v. *Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006), that an employee's claimed superior qualifications for the position sought could show that the employer's articulated reasons were pretextual. As a result, the district court opinions and the appeal's court decision so far departed from this Courts' decisions as to call for an exercise of this Court's supervisory power to restore justice and issue a decision in favor of Petitioners or remand the case for a jury trial.

## CONCLUSION

Wherefore, in consideration of the above, Petitioners Dr. Aleksandr Stoyanov and Dr. Yuri Stoyanov submit for the Court's consideration and decision to grant petition for a writ of certiorari. To apply the laws consistently to all cases, this Court should vacate the appeals court decision that sanctioned wrong and erroneous reasons stated in the district court opinions, issue a decision in favor of Petitioners, or remand this case since Defendants' actions clearly violated remedial statutes of ADEA,

Title VII, WPA, and their antiretaliation protections because of individual Defendants violations of laws and Petitioners' rights. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

7/21/08
Date

Aleksandr Stoyanov
Aleksandr Stoyanov and

Yuri Stoyanov
Yuri Stoyanov

# APPENDIX

FILED: April 28, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07—1969
(I : 05—cv—01567—RDB)
(1 : 05—cv—01611—RDB)

ALEKSANDR J. STOYANOV;
YURI J. STOYANOV,

Plaintiffs - Appellants

v.

DONALD C. WINTER, Secretary of the Navy;
GARY N. JEBSEN,Individually and in his Official Capacity as Head of Code 70, Carderock Division Naval Surface Warfare Center;
JAMES H. KING, Individually and in his Official Capacity as the Head of Code 74, Carderock Division Naval Surface Warfare Center;
JOHN C.DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74, Carderock Division Naval Surface Warfare Center;
STEPHAN M. FARLEY, Individually and in his Official Capacity as the Head of Code 741, Carderock Division Naval Surface Warfare Center;
DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39, Carderock Division Naval Surface Warfare Center,

Defendants - Appellees

ORDER

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk

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FILED: February 25, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07—1969
(1 : 05—cv—01567-RDB)
(1 : 05—cv—01611-RDB)

ALEKSANDR J. STOYANOV;
YURI J. STOYANOV,
Plaintiffs — Appellants

v.

DONALD C. WINTER, Secretary of the Navy; GARY M. JEBSEN, Individually and in his Official Capacity as Head of Code 70, Carderock Division Naval Surface Warfare Center; JAMES H. KING, Individually and in his Official Capacity as the Head of Code 7'l, Carderock Division Naval Surface Warfare Center; JOHN C. DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74, Carderock Division Naval Surface Warfare Center; STEPHAN M. PARLEY, Individually and in his Official Capacity as the Head of Code 741, Carderock Division Naval Surface Warfare Center; DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39, Carderock Division Naval Surface Warfare Center,
Defendants - Appellees

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

*/s/ Patricia S. Connor*, Clerk

**UNPUBLISHED**

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07—1969

ALEKSANDR J. STOYANOV;
YURI J. STOYANOV,
Plaintiffs - Appellants,

v.

DONALD C. WINTER, Secretary of the Navy;
GARY N. JEBSEN, Individually and in his Official Capacity as Head of Code 70, Carderock Division Naval Surface Warfare Center;
JAMES H. KING, Individually and in his Official Capacity as the Head of Code 74, Carderock Division Naval Surface Warfare Center;
JOHN C. DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74, Carderock Division Naval Surface Warfare Center;
STEPHAN M. FARLEY, Individually and in his Official Capacity as the Head of Code 741, Carderook

Division Naval Surface Warfare Center;
DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39, Carderock Division Naval Surface Warfare Center,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Richard D. Bennett, District Judge.
(1 : 05—cv—01567--RDB)

Submitted: February 21, 2008
Decided: February 25, 2008

Before MOTZ and GREGORY, Circuit Judges, and WILKINS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion

Aleksandr J. Stoyanov, Yuri J. Stoyanov, Appellants Pro Se.
John Walter Sippel, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Aleksandr J. Stoyanov and Yuri J. Stoyanov appeal the district court's orders dismissing their claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (2000), the Age Discrimination in Employment Act of 1967, as

amended, 29 U.S.C. §§ 621 to 634 (2000), and the Whistleblower Protection Act, 5 U.S.C. § 2302 (2000) . We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Stoyanov v. Winter, No. l:05—cv--01567—RDB (D. Md. July 25, 2006; Aug. 15, 2007) . We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEKSANDR J. STOYANOV,
Plaintiff *pro se,*

v. CivilActionNo.: RDB-05-1567

DONALD C. WINTER,
SECRETARY OF THE NAVY, *et al.,*
Defendants.

**ORDER AND JUDGMENT**

For the reasons stated in the foregoing Memorandum Opinion, IT IS this 15th day of August 2007, HEREBY ORDERED and ADJUDGED that:

1 . The Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment (Paper No. 87) filed by Defendant Donald C. Winter ("Defendant") is GRANTED and JUDGMENT IS

ENTERED in favor of Defendant and against Plaintiffs Yuri J. Stoyanov and Aleksandr J. Stoyanov ("Plaintiffs");

2. The Motion for Leave to File Rebuttal (Paper No. 101) filed by Plaintiffs is DENIED;
3. Copies of this Order and Judgment and the foregoing Memorandum Opinion shall be sent to Plaintiffs and counsel of record; and
4. The Clerk of this Court shall CLOSE this case.

/s/
Richard D. Bennett
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEKSANDR J. STOYANOV,
Plaintiff *pro se,*
v. Civil ActionNo.: RDB-05-1567

DONALD C. WINTER,
SECRETARY OF THE NAVY, *et al.,*
Defendants.

YURI J. STOYANOV,
Plaintiff *pro se,*
v. CivilActionNo.:RIDB-05-1611

DONALD C. WINTER,
SECRETARY OF THE NAVY, *et al,*
Defendants.

**MEMORANDUM OPINION**

Currently pending before this Court are two

motions: the Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment (Paper No. 87) filed by Defendant Donald C. Winter ("Defendant") and the Motion for Leave to File Rebuttal (Paper No. 101) filed by *pro se* Plaintiffs Aleksandr J. Stoyanov and Yuri J. Stoyanov ("Plaintiffs" or "Stoyanovs"). The parties' submissions have been reviewed and a hearing was conducted on August 8, 2007. For the reasons stated below, Defendant's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment is GRANTED and Plaintiff's Motion for Leave to File Rebuttal is DENIED. As a result, this consolidated action will be CLOSED.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### I. This Consolidated Civil Action.

The factual background and procedural history of this case are described in the Memorandum Opinion issued by this Court on July *25*, 2006, and need not be repeated here. *(See* Paper No. 36 pp. 2-5 .) In that Opinion, this Court granted-in-part and denied-in-part Defendants' Motions to Dismiss or, in the Alternative, for Summary Judgment. *(Id.* at pp. 10-32.) Shortly thereafter, this Court consolidated Civil Action Nos. RDB-05-1567 and RDB-05-1611, and designated Civil Action No. RDB 05-1567 the lead case for purposes of all future filings *(See* Paper No. 45.) As a result, this consolidated action proceeded on certain employment discrimination claims based on national origin, age, and retaliation.

This Court has allowed Plaintiffs to conduct discovery with respect to their retaliation claims in this consolidated action. *(See* Paper No. 36 pp. 24-27.)

As a result, Plaintiffs engaged in written discovery with Defendant and deposed three individuals: Stephen Farley, James King, and David Caron, Esq. *(See, e.g.* , Paper No. 67 p. 1 (Providing that "United States Magistrate Judge Beth P. Gesner will be available to address disputes that arise in connection with [the deposition of David Caron].").) In addition, this Court allowed Plaintiffs to amend their Complaints to include a claim based on alleged violations of the Whistleblower Protection Act. *(See* Paper No. 66 p. 2 (Granting "Plaintiffs request to add a cause of action for "Violations of the Whistleblower Protection Act of 1989 (Public Law 10 1-12).").)

## II The August 8, 2007 Hearing.

As noted above, this Court conducted a hearing on August 8, 2007 with respect to the subject Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment.[1] This Court is troubled by Plaintiffs' conduct at that hearing. Plaintiffs repeatedly accused Defendants' counsel of, *inter alia,* committing egregious acts—including conspiring with the Administrative Law Judge who presided over Plaintiffs' prior administrative action to cover up discriminatory conduct and intentionally misrepresenting facts to this Court.[2] This Court finds

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[1] Plaintiffs have filed a request for leave to supplement that hearing. *(See* Paper No. 104.) This request reflects the same rambling allegations of corruption on the part of agency officials without any foundation. It is consistent with the continual filings of lawsuits in this Court as noted below. By separate Order, Plaintiffs' request for supplementation will be DENIED.

[2] The papers submitted by Plaintiffs level similar accusations. *(See, e.g.* , Paper No. 94 p. 1 ("Defendants ('Dfndts') fabricated pretext based on lies and perjuries of agency officials for the purposes of litigation. The evidence identified below is sufficient

that there is absolutely no basis for such accusations. In general, the continual *ad hominem* nature of Plaintiffs' complaints was exemplified by Plaintiffs' conduct at the hearing. At times, Plaintiffs seemed to suggest that this Court has some bias against Plaintiffs.

## III. Plaintiffs' Other Civil Actions.

This Court notes that Plaintiffs have filed a total of eleven separate civil actions in this Court. After carefully considering the number and nature of these employment discrimination cases, this Court determined that the civil actions filed by Plaintiffs are vexatious and place a burden upon this Court that is unfair to the numerous other *pro se* litigants with whom this Court must share its time. As a result, this Court entered a series of orders limiting Plaintiffs to one active assigned civil case. In reaching that decision, this Court explained that:

> Each of the civil actions filed by Plaintiffs involves extensive allegations of employment discrimination that will require significant motion practice. In the consolidated action, for example, each complaint is approximately 35 pages in length and contains over 150 paragraphs. Each complaint purports to discuss approximately 30 separate incidents of alleged discriminatory conduct, Each incident is treated as a separate violation of, *inter alia,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. At the administrative level, moreover, a significant factual record was created in

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to permit the Court to infer that Dfndts were dissembling to cover up a discriminatory purpose."); *id.* at p. 2 ("Dfndts lied and committed fraud during administrative proceedings to cover up intentional discrimination against Plntfs'.)

connection with Plaintiffs' allegations of employment discrimination. This record significantly increases the complexity of the asserted claims and any substantive motion practice. In addition, these *pro se* Plaintiffs have filed a number of unnecessary motions in the consolidated action, including motions for sanctions, motions to compel defendants to certify under penalty of perjury the content of defendants' correspondence, and at least one motion to compel audiotapes made by the court reporter. Finally, Plaintiffs have suggested that they will file additional civil actions in this Court as their numerous claims continue to work through the administrative process...

(Paper No. 12 pp. 1-2 in Civil Action No. 06-1244.)

The following chart summarizes the status of the eleven civil actions filed by Plaintiffs as of August 14, 2007:

| **Civil Action** No. | **Plaintiff** | **Status/Date Complaint Filed** |
|---|---|---|
| RDB 05-1567 | A. Stoyanov | Proceeding with RDB 05-1611 as this consolidated action. Complaint filed on 6/10/05. |
| RDB 05-1611 | Y. Stoyanov | Proceeding with RDB 05-1567 as this consolidated action. Complaint filed on 6/14/05. |
| 05-2819 | A. Stoyanov | Placed on the inactive/unassigned docket. Complaint filed |

| | | |
|---|---|---|
| | | on 10/14/05. |
| 06-1244 | Y. Stoyanov | Placed on the inactive/unassigned docket. Complaint filed on 5/17/06. |
| 06-1245 | A. Stoyanov | Placed on the inactive/unassigned docket. Complaint filed on 5/17/06. |
| 06-2968 | A. Stoyanov | Placed on the inactive/unassigned docket. Complaint filed on 11/13/06. |
| 07-1726 | A. Stoyanov | Placed on the inactive/unassigned docket. Complaint filed on 6/29/07. |
| 07-1764 | Y. Stoyanov | Placed on the inactive/unassigned docket. Complaint filed on 7/06/07. |
| 07-1863 | Y. Stoyanov | Placed on the inactive/unassigned docket. Complaint filed on 7/16/07. |
| 07- 1953 | Y. Stoyanov | Placed on the inactive/unassigned docket. Complaint filed on 7/23/07. |
| 07- 1985 | Y. Stoyanov | Placed on the inactive/unassigned docket. Complaint filed on 7/25/07. |

## STANDARD OF REVIEW

## I. Motion for Judgment on the Pleadings

With respect to certain claims, Defendant moves for judgment on the pleadings under Rule 12(e) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(c) ("After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."); ***see also*** 5A C. Wright & A. Miller, Federal Practice & Procedure § 1367 (West 1990) (pleadings are considered closed "upon the filing of a complaint and answer.") (citing Fed. R. Civ. P. 7(a); footnotes omitted).

The standard of review for a Rule 12(e) motion and a Rule 12(b)(6) motion is identical. *Burbach Broad. Co.* v. *Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002); *Edwards v. City of Goldsboro,* 178 F.3d 231, 243 (4th Cir. 1999). "[T]he purpose of Rule 12(b)(6) is to test the legal sufficiency of a complaint" and not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley* v. *City of Charlottesville,* 464 F.3d 480, 483 (4th Cir. 2006) (quoting *Edwards* v. *City of Goldsboro,* 178 F.3d 231, 243-44 (4th Cir. 1999)). As the legal sufficiency of the complaint is challenged under a Rule I 2(b)(6) motion, the court assumes "the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations." *Eastern Shore Mkts.* v. *ID. Assocs. Ltd P'ship,* 213 F.3d 175, 180 (4th Cir. 2000) (citing *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)). A Rule 12(b)(6) motion to dismiss "should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Migdal* v. *Rowe Price-Fleming Int'l Inc.,* 248 F.3d 321, 325 (4th Cir.

2001); see also *Venkatrainan v. REI Sys., Inc.*, 417 F.3d 418, 420 (4th Cir. 2005). Furthermore, the "Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley* **V.** *Gibson, 355* U.S. 41, 47 (1957). Rather, Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Migdal,* 248 F.3d at *325-26; see also Swierkiewicz v. Sorema* NA., 534 U.S. 506, *5* 1 3 (2002) (stating that a complaint need only satisfy the "simplified pleading standard" of Rule 8(a)). However, while "notice pleading requires generosity in interpreting a plaintiffs complaint . . . generosity is not fantasy." *Bender v. Suburban Hosp., Inc., 159* F.3d 186, 191 (4th Cir. 1998).

## II Motion for Summary Judgment.

Summary judgment is appropriate under Rule *56(e)* of the Federal Rules of Civil Procedure when there is no genuine issue as to any material fact, and the moving party is plainly entitled to judgment in its favor as a matter of law. In *Anderson* v. *Liberty Lobby, Inc.* , *477* U.s. 242, 249 (1986), the Supreme Court explained that, in considering a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *A* dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Thus, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Id.* at 252.

In undertaking this inquiry, a court must view the facts and the reasonable inferences drawn therefrom "in the light most favorable to the party opposing the motion," *Matsushita Elec. Inc/us. Co.* v. *Zenith Radio Corp.*, 475 U.S. *574, 587* (1986) (quoting *United States v. Diebold Inc.*, 369 U.S. 654, 655 (1962)); *see also E.E.O.C.* v. *Navy Federal Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). However, the opponent must bring forth evidence upon which a reasonable fact finder could rely. *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). "Once the movant has established the absence of any genuine issue of material fact, the opposing party has an obligation to present some type of evidence to the court demonstrating the existence of an issue of fact." *Pension Ben. Guar. Corp.* v. *Beverley*, 404 F.3d 243, 246-47 (4th Cir. 2005) (citing *Pine Ridge Coal Co.* v. *Local 8377, UMW*, 187 F.3d 415, 422 (4th Cir. 1999)). Rule 56(e) also requires that "affidavits submitted by the party defending against a summary - judgment motion contain specific facts, admissible in evidence, from an affiant competent to testify, ' showing that there is a genuine issue for trial. ' " *Id.* (quoting 1 OB Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2740, 399 (3d ed. 1998)). The mere existence of a "scintilla" of evidence in support of the nonmoving party's case is not sufficient to preclude an order granting summary judgment. *Anderson, 477* U.S. at 252.

This Court has previously held that a "party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences." *Shin* v. *Shalala*, 166 F . Supp. 2d 373, 375 (D. Md. 2001) (citations omitted). Indeed, this Court has an affirmative obligation to prevent factually

unsupported claims and defenses from going to trial. *Drewitt* v. *Pratt, 999* F.2d 774, 778-79 (4th Cir. 1993) *(quoting Felty* v. *Graves-Humphreys Co.,* 818 F.2d 1126, 1128 (4th Cir. 1987)).

## DISCUSSION

### I. Causes Of Action At Issue.

Plaintiffs' remaining causes of action include: (A) claims of alleged violations of the Whistleblower Protection Act; (B) claims of fraudulent promotion based on conduct that occurred before Plaintiffs sought Equal Employment Opportunity ("EEO") counseling; and (C) claims based on conduct that, *inter alia,* involves allegations of retaliation for participating in protective activity. These claims are addressed below.

### II Claims Based On The Whistleblower Protection Act.

As already noted, Plaintiffs' Complaints were amended to include a claim based on alleged violations of the Whistleblower Protection Act, S U.S.C. § 2302(b)(8) (the "WPA"). *(See* Paper No. 66 p. 2 (Granting "Plaintiffs request to add a cause of action for "Violations of the Whistleblower Protection Act of 1989 (Public Law 101-12).").) Defendants move for summary judgment with respect to these claims on grounds that (1) Plaintiffs failed to exhaust their administrative remedies, and (2) this Court is jurisdictionally barred from hearing Plaintiffs' WPA claims.

With respect to exhaustion of administrative remedies, Defendant explains that:

> Under normal circumstances, employees who claim retaliation under the WPA must first report the claim to the Office of Special Counsel, 5 U.S .C. §

> 1214(a)(1)(A), and exhaust administrative remedies. Thereafter, employees may seek redress from the Merit Systems Protection Board ("MSPB"), S U.S.C. § 1214(a)(3), with an appeal, if necessary, to the Court of Appeals for the Federal Circuit. See 5 U.S.C. § 1221(h). Yet, in a "mixed case" asserting both WPA and discrimination claims, a plaintiff properly exhausts administrative remedies either (i) by seeking administrative relief with the MSPB, or (ii) by filing a complaint with the applicable agency EEO office, and either body may resolve claims of both types. *SeeMcAdains* v. *Reno,* 64F.3d 1137, 1141 (8th Cir. *1995)* ("A mixed case may be filed as a complaint with the agency's EEO department or as an appeal to the MSPB, but not both."); *Quinn* v. West, 140 F. Supp. 2d 725, 733 (W.D. Tex. 2001); 29 C.F.R. § 1614.302(b). If a plaintiff picks the EEO forum to hear a mixed case, he "may file a civil discrimination case in federal court within 30 days of a final decision by the agency or after 120 days have passed without a decision, but only ifno appeal to the MSPB is pursued at that time." See *McAdams v. Rena, 64* F.3d at 1142; *5* U.S.C. § 7702(e)(1)(A); 29 C.F.R. § 1614.310(a).

(Paper No . 87 p. 1 8 .) In this case, Defendants point out that there is no evidence to suggest either that Plaintiffs included any WPA claims in their initial EEO complaints or that Plaintiffs' WPA claims were adjudicated at the administrative level. Defendants also emphasize that there is no evidence indicating that the claims that Plaintiffs actually submitted to the Office of Special Counsel were WPA claims or the proposition that Plaintiffs exhausted their administrative remedies after submitting such claims

to the Office of Special Counsel. Plaintiffs do not offer a substantive response to these procedural arguments. As a result, this Court finds that Plaintiffs failed to exhaust their administrative remedies with respect to their WPA claims. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on alleged violations of the Whistleblower Protection Act.[3]

## III. Claims of Fraudulent Promotion.

This Court previously ruled that "[i]n the absence of additional briefing by the parties, this Court cannot conclude that—at least with respect to Plaintiffs' claims *based on allegedly fraudulent promotions*—after accepting all well-pleaded allegations in the plaintiffs complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." (Paper No. 36 p. 1 8 (emphasis added; internal quotation marks and citation omitted).) Additional briefing has been submitted with respect to Plaintiffs'

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[3] Defendants acknowledge that Plaintiffs submitted WPA claims to the Office of Special Counsel in 2005 . Those claims were denied by the Office of Special Counsel and Plaintiffs appealed to the Merit Systems Protection Board ("MSPB"). This Court cannot consider these claims, however, because Plaintiffs elected to appeal to the MSPB instead of submitting their claims to the EEO Office. *McAdams*, 64 F.3d at 1 141 ("A mixed case may be filed as a complaint with the agency's EEO department or as an appeal to the MSPB, but not both."). Accordingly, Defendant's Motion for Judgment on the Pleadings is GRANTED with respect to claims based on alleged violations of the Whistleblower Protection Act that Plaintiffs submitted to the Office of Special Counsel in 2005. . *See generally Stoyanov v. Dept. of Navy*, 474 F.3d 1377 (Fed. Cir. 2007); *Stoyanov* v. *Merit Systems Protection Board*, Nos. 2006-3358 & 2006-3359, 2007 WL 444806 (Fed. Cir. Feb. 12,2007)(unpublished).

claims that the following individuals were fraudulently promoted : Richard Renfro, Wayne Nickols, Kevin Wilson, Gary Miller, William Stephens, and Steven Russell.[4] Defendant moves for judgment as a matter of law with respect to these claims and, for reasons explained below, Defendant's motion will be GRANTED.

In the absence of direct evidence of discrimination, the familiar three-step burden-shifting model of circumstantial evidence of discrimination set forth by the Supreme Court in *McDonnell Douglas Corp.* v. *Green, 41* 1 U.S. 792, 802 (1973) applies to Plaintiffs' remaining discrimination claims.[5] Although this burden-shifting framework was established in the context of Title VII, this Court has applied the same analysis to age-based discrimination claims under the AIDEA. *See, e.g., Caussade v. Brown,* 924 F. Supp. 693, 698 (D. Md. 1996), *affd* 107 F.3d 865 (4th Cir. 1997) (citing *Lovelace v. Shervvin-Williams Co.,* 681 F.2d 230, 239 (4th Cir. 1982)). As a result, each of Plaintiffs ' claims for employment discrimination, including their age-based claims under the ADEA, is subject to the *McDonnell Douglas* burden-shifting scheme.

To establish a cause of action for discriminatory discharge, the plaintiff bears the initial burden of

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[4] *(See* Paper No. 36 p. 17 (Noting that Defendants did not challenge the affidavit submitted by Plaintiffs averring that "[t]he claims of intentional discrimination against Plaintiff{s] with regard to fraudulent promotions of Russell, Miller, Stephens, Renfro, Wilson, and Nichols were developed by reasonable investigation after filing original complaint in February 2002. . . .").)

[5] *(See* Paper No . 36 pp. 20-21 (finding that Plaintiffs failed to forecast any direct evidence of discrimination based on age or national origin).)

proving *a prima facie* case of discrimination. *McDonnell Douglas,* 41 1 U.S. at 802. There are specific elements that must be satisfied under both a Title VII and ADEA analysis in order for the plaintiff to meet this initial burden. If a *prima facie* case is established, the burden then shifts to the defendant to rebut the inference. *McDonnell Douglas,* 41 1 U.S. at 802. While the defendant's burden is not onerous, it must articulate "some legitimate, nondiscriminatory reason" for the disparate treatment. *Id.* In this regard, the Court "does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination" so that "when an employer articulates a reason for [its treatment of the plaintiff] not forbidden by law, it is not [the court' s] province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the [employment decision]." *De.Jarnette* v. *Corning, Inc.,* 133 F.3d 293, 298-299 (4th Cir. 1998) (internal quotations and citations omitted).

If the defendant articulates a legitimate, non-discriminatory reason for its conduct, the ultimate burden shifts to the plaintiff to show that the defendant's stated reason is "pretext." *Iv[cDonnellDouglas,* 41 1 U.S. at 804. In evaluating whether the plaintiff has adduced a sufficient quantity of proof, the court may consider the relative strength of the employer's asserted nondiscriminatory reasons. *Burns v. AAF-McQuay. Inc., 96* F.3d 728, 732 (4th Cir. 1996). However, unsubstantiated allegations and bald assertions will not cany the day for the employee. *Evans* v. *Tech. App. & Serv. Co.,* 80 F.3d 954, 960 (4th Cir. 1996); *see also Goldberg v. B. Green & Co., Inc.,* 836 F.2d 845, 848 (4th Cir. 1988) (naked opinions and

conclusory allegations are insufficient to withstand summary judgment). If the plaintiff cannot present facts that would permit a reasonable inference that the stated reason is a pretext for discrimination, summary judgment in favor of the defendant should be granted. *See Rowe v. Marley Co.* , 233 F.3d 825, 830 (4th Cir. 2000) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-47 (2000)).

In this case, Plaintiffs assert claims for discrimination based on national origin, age, and retaliation. To establish *a prima facie* case of discrimination under Title VII or the ADEA, Plaintiffs must show that they: (1) are members of a protected class; (2) suffered an adverse employment action; (3) were at the time performing their job duties at a level that met their employer's legitimate expectations; and (4) the position remained open or was filled by a similarly qualified applicant outside the protected class. *See, e.g., Miles v. Dell, Inc.*, 429 F.3d 480, 485 (4th Cir. *2005)* (Title VI1); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004) (age). In the context of a failure to promote claim, Plaintiffs must show that they: (1) are members of a protected class; (2) applied for the position(s) in question; (3) were qualified for each position; and (4) were rejected for each position under circumstances giving rise to an inference of unlawful discrimination. *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 268 (4th Cir. 2005). Plaintiffs' retaliation claims are addressed in a later section of this Opinion. *See* Discussion *infra* § IV.

A. **Richard Renfro—Accretion of Duties Promotion.**

Richard Renfro, an American who was born in 1956, was hired as a career employee by the Navy on

December 3, 1984. Renfro was promoted to an "ND-5"—which Defendant represents is the equivalent of a GS- 15—*via* an "accretion of duties" promotion on or about November 12, 1989, which is approximately eight days *before* Plaintiffs began their "permanent" career positions at NSWCCD. Renfro left NSWCCD in fiscal year 2000.

Defendant moves for summary judgment with respect to this claim on the following grounds:

- Plaintiffs cannot establish *a prima facie* case of discrimination because there is no evidence to suggest that Plaintiffs *applied for or requested* this accretion of duties promotion.
- Plaintiffs cannot establish *a prima facie* case of discrimination because there is no evidence to suggest that Plaintiffs were *qualified* to receive this accretion of duties promotion. Under 5 C.F.R. § 300.604(a), Plaintiffs were required to be in their ND-4 positions for at least 52 weeks before they would be eligible for a promotion to an ND-S position.
- Plaintiffs cannot establish *a prima facie* case of discrimination because, at the time of the promotion, Renfro was 32 and Plaintiffs were 34. *See* 29 U.S.C. § 633a(a)("All personnel actions affecting employees or applicants for employment who are *at least 40 years of age* . . . shall be made free from any discrimination based on age.") (emphasis added).

Plaintiffs do not offer any substantial response to these arguments in their opposition papers. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' discrimination claims involving Richard Renfro.

**B. Wayne Nickols—Accretion of Duties**

**Promotion.**

Wayne Nickols, an American who was born in 1961, began his career at NSWCCD on December 10, 1984. In October 1996, Nickols was promoted to an ND-5 position *via* an accretion of duties promotion based on his assumption of additional duties and responsibilities. Nickols left NSWCCD in fiscal year 2000.

Defendant moves for summary judgment with respect to this claim on the following grounds:

- Plaintiffs cannot establish *a prima facie* case of discrimination because there is no evidence to suggest that Plaintiffs *applied for or requested* this accretion of duties promotion.
- Plaintiffs cannot establish *a prima facie* case of discrimination because there is no evidence to suggest that Plaintiffs were *qualified* to receive this accretion of duties promotion. Specifically, Defendant points out there is no evidence that Nickols was not performing sufficient additional duties and responsibilities to warrant the promotion. Likewise, there is no evidence that Plaintiffs had assumed sufficient additional duties and responsibilities to warrant the promotion, or that they should have been given or requested additional duties and responsibilities.
- Plaintiffs cannot establish *a prima facie* case of discrimination because, at the time of the promotion, Nickols was 35 and Plaintiffs were 41. Defendant contends that this six year age difference is not enough to show that Nickols was "substantially younger" than Plaintiffs. *See Jeffers v. Thompson*, 264 F. Supp. 2d 314, 328 (D. Md. 2003) (providing that an eleven year age gap is sufficient but a five year gap is probably not);

*Grosjean v. First Energy Corp.*, 349 F.3d 332, 340 (6th Cir. 2003) (absent direct evidence of age discrimination, "an age difference of six years or less between an employee and a replacement is not significant").

Plaintiffs' primary response is that the promotion of Nickols was fraudulent. *(See, e.g.* , Paper No. 94 pp. 23-24.) However, Plaintiffs support this assertion with nothing more than conclusory statements and declarations. *See Burns v. AAF-McQuay, Inc., 96* F.3d 728, 732 (4th Cir. 1996) (in evaluating whether plaintiff has adduced a sufficient quantity of proof, the court may consider the relative strength ofthe employer's asserted nondiscriminatory reasons); *Evans v. Tech. App. & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) (unsubstantiated allegations and bald assertions will not carry the day for employee); *Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. I 98 8) (naked opinions and conclusory allegations insufficient to withstand summary judgment). Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' discrimination claims involving Wayne Nickols.

### C. Kevin Wilson—Accretion of Duties Promotion.

Kevin Wilson, an American who was born in 1955, began his career at NSWCCD in June 1978. In November 1998, Wilson was promoted to an ND-5 position *via* an accretion of duties promotion based on his assumption of additional duties and responsibilities. At the time of his promotion, Wilson had eleven years of seniority over Plaintiffs and both Wilson and Plaintiffs were 43 years old.

Defendant moves for summary judgment with respect to this claim on the following grounds:

- Plaintiffs cannot establish *a prima facie* case of discrimination because there is no evidence to suggest that Plaintiffs *applied for or requested* this accretion of duties promotion.
- Plaintiffs cannot establish a prima facie case of discrimination because there is no evidence to suggest that Plaintiffs were *qualified* to receive this accretion of duties promotion. Specifically, Defendant points out there is no evidence that Wilson was not performing sufficient additional duties and responsibilities to warrant the promotion. Likewise, there is no evidence that Plaintiffs had assumed sufficient additional duties and responsibilities to warrant the promotion, or that they should have been given or requested additional duties and responsibilities.
- Plaintiffs cannot establish *a prima facie* case of discrimination because, at the time of the promotion, Wilson and Plaintiffs were the same age.

Plaintiffs' primary response is that the promotion of Wilson was fraudulent. *(See, e.g.* , Paper No. 94 pp. 23-24.) However, Plaintiffs support this assertion with nothing more than conclusory statements and declarations. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' discrimination claims involving Kevin Wilson.

**D. Gary Miller—Accretion of Duties Promotion.**

Gary Miller, an American who was born in 1 95 8, began his career at NSWCCD in July 1979. In March 2001, Miller was promoted to an ND-S position *via* an accretion of duties promotion based on his

assumption of additional duties and responsibilities. At the time of his promotion, Miller was 43 years old and had approximately ten years of seniority over Plaintiffs. In contrast, Plaintiffs were 46 years old.

Defendant moves for summary judgment with respect to this claim on the following grounds:

- Plaintiffs cannot establish *a prima facie* case of discrimination because there is no evidence to suggest that Plaintiffs *applied for or requested* this accretion of duties promotion.
- Plaintiffs cannot establish a *prima facie* case of discrimination because there is no evidence to suggest that Plaintiffs were *qualified* to receive this accretion of duties promotion. Specifically, Defendant points out there is no evidence that Miller was not performing sufficient additional duties and responsibilities to warrant the promotion. Likewise, there is no evidence that Plaintiffs had assumed sufficient additional duties andresponsibilities to warrant the promotion, or that they should have been given or requested additional duties and responsibilities.
- Plaintiffs cannot establish *a prima facie* ease of discrimination because, at the time of the promotion, Miller was 43 and Plaintiffs were 46. Defendant contends that this three year age difference is not enough to show that Miller was "substantially younger" than Plaintiffs. *See Jeffers,* 264 F. Supp. 2d at 328 (providing that an eleven year age gap is sufficient but a five year gap is probably not); *Grosjean,* 349 F.3d at 340 (absent direct evidence of age discrimination, "an age difference of six years or less between an employee and a replacement is not significant").

Plaintiffs' primary response is that the promotion of

Miller was fraudulent. *(See, e.g.* , Paper No. 94 pp. 26-27.) Plaintiffs also argue that Miller's promotion was not announced and that Miller was promoted "to cover up intentional discrimination against Plaintiffs. . . ." *(Id.* at p. 26.) However, Plaintiffs support these assertions with nothing more than conclusory statements and declarations. *See Burns, 96* F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' discrimination claims involving Gary Miller.

**E. William Stephens—Accretion of Duties Promotion.**

William Stephens, an American who was born in I 959, began his career at NSWCCD in October 1989. in June 2000, Stephens was promoted to an ND-S position via an accretion of duties promotion based on his assumption of additional duties and responsibilities . Defendant emphasizes evidence in the record suggesting that Stephens' leadership and performance abilities were well recognized. At the time ofhis promotion, Stephens was 41 years old and Plaintiffs were 45 years old.

Defendant moves for summary judgment with respect to this claim on the following grounds:

- Plaintiffs cannot establish *a prima facie* case of discrimination because there is no evidence to suggest that Plaintiffs *applied/or or requested* this accretion of duties promotion.
- Plaintiffs cannot establish *a prima facie* case of discrimination because there is no evidence to suggest that Plaintiffs were *qualified* to receive this accretion of duties promotion. Specifically, Defendant points out there is no evidence that Stephens was not performing sufficient additional

duties and responsibilities to warrant the promotion. Likewise, there is no evidence that Plaintiffs had assumed sufficient additional duties and responsibilities to warrant the promotion, or that they should have been given or requested additional duties and responsibilities.

. Plaintiffs cannot establish *a prima facie* case of discrimination because, at the time of the promotion, Stephens was 41 and Plaintiffs were 45 . Defendant contends that this four year age difference is not enough to show that Stephens was "substantially younger" than Plaintiffs. *See Jeffers,* 264 F. Supp. 2d at 328 (providing that an eleven year age gap is sufficient but a five year gap is probably not); *Grosfean,* 349 F.3d at 340 (absent direct evidence of age discrimination, "an age difference of six years or less between an employee and a replacement is not significant").

Plaintiffs' primary response is that the promotion of Stephens was fraudulent. *(See, e.g.* , Paper No. 94 pp. 26-27.) Plaintiffs also argue that Stephens' promotion was not announced and that Stephens was promoted "to cover up intentional discrimination against Plaintiffs. . . " *(Id.* at p. 26.) However, Plaintiffs support these assertions with nothing more than conclusory statements and declarations. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' discrimination claims involving William Stephens.

### F. Steven Russell—Accretion of Duties Promotion.

Steven Russell, an American who was born in 1961, began his employment with the Navy on March 23, 1987. In March 2002, Russell was promoted to an

ND-5 position *via* an accretion of duties promotion based on his assumption of additional duties and responsibilities. Defendant emphasizes evidence in the record suggesting that Russell's leadership andperformance abilities were well recognized. At the time of his promotion, Russell was 40 years old and Plaintiffs were 46 years old.

Defendant moves for summary judgment with respect to this claim on the following grounds:

- Plaintiffs cannot establish *a prima facie* case of discrimination because there is no evidence to suggest that Plaintiffs *applied for or requested* this accretion of duties promotion.
- Plaintiffs cannot establish *a prima facie* case of discrimination because there is no evidence to suggest that Plaintiffs were *qualified* to receive this accretion of duties promotion. Specifically, Defendant points out there is no evidence that Russell was not performing sufficient additional duties and responsibilities to warrant the promotion. Likewise, there is no evidence that Plaintiffs had assumed sufficient additional duties and responsibilities to warrant the promotion, or that they should have been given or requested additional duties and responsibilities.
- Plaintiffs cannot establish a *prima facie* case of discrimination because, at the time of the promotion, Russell was 40 and Plaintiffs were 46. Defendant contends that this six year age difference is not enough to show that Stephens was "substantially younger" than Plaintiffs. *See Jeffers*, 264 F. Supp. 2d at 328 (providing that an eleven year age gap is sufficient but a five year gap is probably not); *Grosjean*, 349 F.3d at 340 (absent direct evidence of age discrimination, "an age

difference of six years or less between an employee and a replacement is not significant").

Plaintiffs' primary response is that the promotion of Russell was fraudulent. *(See, e.g.* , Paper No. 94 pp. 22-23.) Plaintiffs also argue that they were more qualified than Russell and that individuals involved with this promotion lied. *(Id.* at p. 22.) However, Plaintiffs support their assertions with nothing more than conclusory statements and declarations. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' discrimination claims involving Steven Russell.

## G. Other Promotion Claim.

In his reply papers, Defendant moves for summary judgment with respect to Plaintiffs' claim that Paul Honke was fraudulently promoted . Specifically:

. Plaintiffs cannot establish *a prima facie* case of discrimination with respect to the promotion ofPaul Honke in August 2001 because: (1) A. Stoyanov waived this claim by raising it at the administrative level but *not* asserting it in his Complaint; (2) Y. Stoyanov failed to exhaust his administrative remedies by *not* raising this claim at the administrative level (although he did raise it in his Complaint); and (3) there is no evidence to suggest that Plaintiffs *applied for or requested* this promotion eveu though it was awarded through a vacancy announcement.

Plaintiffs' primary response is that the promotion of Honke was fraudulent. *(See, e.g.* , Paper No. 94 p. 3 1 .) However, Plaintiffs support their assertion with nothing more than conclusory statements and declarations. *See Burns,* 96 F.3d at 732; *Evans,* 80

F.3d at 960; *Goldberg*, 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' discrimination claims involving Paul Honke.

## IV. Retaliation Claims.

This Court previously ruled that "Plaintiffs' retaliation claims are not susceptible to summary judgment prior to the conduct of discovery. This case will therefore proceed with respect to Plaintiffs ' retaliation claims. . . ." (Paper No. 36 p. 25 .) Discovery has since been conducted. Defendant has moved for judgment as a matter of law with respect to those claims and, for reasons explained below, Defendant's motion will be GRANTED.

To prove *a prima facie* case of retaliation, Plaintiffs must demonstrate that (1) they engaged in protected activity, (2) a reasonable employee would have found the challenged action materially adverse, and (3) there was a causal connection between the activity and the challenged action. *See Burlington N. & S. F. R. Co. v. White,* U.S. , , 126 5. Ct. 2405, 2415, No. 05-259, slip op. at 13 (2006); *Price v. Thompson,* 380 F.3d 209, 212 (4th Cir. 2004). This standard is derived in large part from the Supreme Court's recent decision in *Burlington.* In that case, the Supreme Court held that a retaliation claim may proceed if the plaintiff can show "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington, 126 5. Ct. At 2415 (citations and internal quotation marks omitted). In making this determination, the Supreme Court rejected the Fourth Circuit's prior holding that *a prima facie* case of retaliation under

Title VII requires showing that the challenged employment action "result[s] in an adverse effect on the 'terms, conditions, or benefits' of employment." *Id.* at 2410 (quoting *Von Gunten v. Maryland,* 243 F.3d 858, 866 (4th Cir. 2001)).

### A. Stoyanov's Claim That He Was Denied Directly Funded Work, Excluded From Managing Projects, And Not Assigned Positions Of Higher Responsibility.

A. Stoyanov claims that he was denied directly funded work, excluded from managing projects, and was not assigned to positions of higher responsibility.[6] Defendant moves for summary judgment with respect to claims based on these employment decisions for the following reasons:

. A. Stoyanov cannot establish *a prima facie* case of retaliation because a reasonable employee would not have found Defendant's actions materially adverse and becausethere is no causal connection between A. Stoyanov's participation in the EEO process and any of the challenged actions. Specifically, Defendant contends that: (1) A. Stoyanov was *not* denied directly funded work, excluded from managing projects, and not assigned to positions of higher responsibility; (2) even if A. Stoyanov did not have directly funded work, he was placed on overhead where his salary, benefits, and job title remained the same; (3) other employees had their directly funded work cut from time to

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[6] Defendant represents that "[a]n employee can be funded in two ways: overhead funding or direct funding. Overhead funding comes out of the Division' s overhead. Direct funding is derived from specific work funded by a Division sponsor. Senior Engineers are expected to develop sponsors and acquire direct funding." (Paper No. 87 p. 32 n.8.)

time; (4) A. Stoyanov was assigned to manage projects and positions of higher responsibility, including Head of the Komodo project (1 987), acting Branch Head of Code 741 *(2000),* work on LID (2002), RCS Measurement Director and Tech Leader on LMS Signature Analysis (1998 to Sept. 2001); and (5) there is no evidence to suggest that the decisions at issue were affected by A. Stoyanov's participation in protected activity.

Even if A. Stoyanov could establish *a prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged actions. Specifically, Defendant contends that: (1) directly funded work was not assigned by A. Stoyanov's supervisors; (2) neither King nor Fancy controlled which employees received directly funded work; and (3) A. Stoyanov' s work was sometimes sub-par in tenns of performance and delivering useful products and managing assigned tasks.

Plaintiffs make three main points in response: (1) other employees with inferior qualifications received better treatment and were promoted to ND-5 positions even though Plaintiffs were best qualified; (2) Plaintiffs' salary and benefits were reduced when they did not receive demo points; and (3) Navy officials lied to cover-up intentional discrimination. *(See* Paper No. 94 pp. 32-35 .) With the exception of Russell and Young (which are discussed below), the promotions that Plaintiffs rely on all occurred *before* Plaintiffs' sought EEO counseling. As a result, Plaintiffs cannot ground their retaliation claims on these employment decisions. With respect to matter of demo points, this Court previously rejected—and Plaintiffs have not forecast any evidence to support—that claim. *(See* Paper No. 36 pp. 15-17.) With respect to the claim that

Navy officials lied, Plaintiffs support their assertion with nothing more than conclusory statements and declarations. *See Burns*, 96 F.3d at 732; *Evans*, 80 F.3d at 960; *Goldberg*, 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to A. Stoyanov's claims that he was denied directly funded work, excluded from managing projects, and was not assigned to positions of higher responsibility.

**B. Change In Work Schedule.**

Plaintiffs claim that they were discriminated against when their work schedule was changed beginning on February 21 , 2002. Specifically, the Carderock Leadership Council decided to enforce its "core hour" provisions and A. Stoyanov subsequently met with a supervisor to discuss the impact of this decision on Plaintiffs' family needs. Defendant moves for summary judgment with respect to claims based on these employment decisions for the following reasons:

- Plaintiffs cannot establish *a prima facie* case of retaliation because a reasonable employee would not have found Defendant's actions materially adverse and because there is no causal connection between Plaintiffs' participation in the EEO process and any of the challenged actions. Specifically, Defendant contends that: (1) A. Stoyanov was told that he could submit a request for an exception and that his supervisor would consider a different schedule based on Plaintiffs' family needs but exception was submitted; (2) the enforcement of the "core hours" provisions applied to everyone in the Division; (3) there is no evidence that Plaintiffs were disciplined for violating the core hours provisions; and (4) there is no evidence to suggest that the decision at issue was affected by

Plaintiffs' participation in protected activity.

. Even if Plaintiffs could establish a *prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. Specifically, Defendant contends that: (1) enforcement of the core hours provisions was to create consistency across division sites; and (2) there is no evidence to suggest that this action was a pretext for discrimination.

Plaintiffs' primary response is that the change in their work schedule was retaliatory and created a hostile work environment. *(See, e.g.* , Paper No. 94 pp. 35-36.) Plaintiffs also contend that the core hours provisions were not enforced in some divisions. *(Id.* at p. 36.) With respect to their hostile work environment allegation, this claim was not asserted during the administrative process and, as a result, this Court lacks subject matter jurisdiction over this claim. With respect to Plaintiffs other contentions, this Court finds that Plaintiffs have not forecast sufficient evidence to support their assertions. Instead, Plaintiffs' rely on conclusory statements and declarations. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims that they were discriminated against when their work schedule was changed beginning on February 21, 2002.

### C. Promotion Of Russell And Young.

In March 2002, Steven Russell was awarded an accretion of duties promotion to an ND-S position. *See supra* Discussion § III.F. In May 2002, Russell was assigned to the position of Chief Scientist. In April 2002, John Young was promoted to a temporary ND-S position. Defendant moves for summary judgment

with respect to claims based on these employment decisions for the following reasons:

- Plaintiffs cannot establish *a prima facie* case of retaliation with respect to Russell's promotion to the ND-S position because there is no causal connection between Plaintiffs' participation in the EEO process and any of the challenged actions. Specifically, Defendant emphasizes that Russell's promotion was initiated *prior* to the time that A. Stoyonav participated in protected activity.
- Plaintiffs cannot establish *a prima facie* case of retaliation with respect to Russell's assignment to the Chief Scientist position because a reasonable employee would not have found Defendant's action materially adverse. Specifically, Defendant contends that the Chief Scientist assignment is a staffposition and there is no grade level associated with the position. Even if Plaintiffs could establish *a prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. Specifically, Defendant contends that Russell was performing the work and had accrued the skills for the Chief Scientist position whereas A. Stoyanov had not.
- Plaintiffs cannot establish a *prima facie* ease of retaliation with respect to Young's promotion because there is no causal connection between Plaintiffs ' participation in the EEO process and any of the challenged actions. Specifically, Defendant contends that the position was advertised, Young was the only person who was certified, and there is no evidence that A. Stoyanov applied for the announced position. Even if Plaintiffs could establish *a prima facie* case, Defendant has articulated legitimate, non-

discriminatory reasons for the challenged action. Specifically, Defendant emphasizes again that A. Stoyanov never applied for the announced position. Plaintiffs offer a number of arguments in response to Defendant's motion. *(See, e.g.*, Paper No. 94 pp. 25-26.) With respect to Russell's promotion to the ND-S position, Plaintiffs assert that the promotion was fraudulent and that management lied. *(Id.* at 1 5-2 .) To support this assertion, however, Plaintiffs rely on conclusory statements and declarations. With respect to Russell's assignment to the Chief Scientist position, Plaintiffs argue that King lied about this action and that A. Stoyanov had superior qualifications. Again, Plaintiffs rely on conclusory statements and declarations to support these claims. With respect to Young's temporary promotion, Plaintiffs repeat their argument that the promotion was fraudulent. However, Plaintiffs rely on conclusory statements and declarations to support these claims. Ultimately, Plaintiffs fail to support their claims with credible or admissible evidence. *See Burns*, 96 F.3d at 732; *Evans*, 80 F.3d at 960; *Goldberg*, 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on the promotions of Russell and Young.

**D. Assignment Of Certain Tasks To A. Stoyanov.**

In April 2002, A. Stoyanov was assigned the task of picking-up antennae from Virginia. In September 2002, A. Stoyanov was assigned to work on a test in the water channel and turbine tank tunnel. These tasks were assigned by Stephen Farley, one of A. Stoyanov' s supervisors. Defendant moves for summary judgment with respect to claims based on these employment decisions for the following reasons:

. Plaintiffs cannot establish *a prima facie* case of

retaliation with respect to the assigned tasks because a reasonable employee would not have found Defendant's action materially adverse and because there is no causal connection between Plaintiffs' participation in the EEO process and the challenged actions. Specifically, Defendant emphasizes that A. Stoyanov did not suffer any decrease in pay or a change in benefits, the tasks were only one day in duration, and the tasks did not interfere with A. Stoyanov's regular work duties.

- Even if Plaintiffs could establish *a prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. With respect to the task of picking-up antennae, Defendant contends that A. Stoyanov was on overhead and available to perform the task, no junior employees were available to perform the task, and the antennae needed to be picked up immediately. After A. Stoyanov performed the task, Farley sent him an email to thank him. With respect to the task of working on a test in the water channel and turbine tank tunnel, Defendant contends that the task was for only one day and that Farley assigned A. Stoyanov this task in an effort to involve A. Stoyanov in different projects. Defendant points out that Farley was frustrated in his effort to find new tasks for A. Stoyanov, who "considered it offensive unless he was leading the project or work. The result would be that A. Stoyanov would not get involved with new or different projects and would accuse Farley of not giving him a high enough position." (Paper No. 87 p. 38 (citations omitted).)
- Plaintiffs cannot establish *a prima facie* case of

retaliation with respect to Young's promotion because there is no causal connection between Plaintiffs' participation in the EEO process and any of the challenged actions. Specifically, Defendant contends that the position was advertised, Young was the only person who was certified, and there is no evidence that A. Stoyanov applied for the announced position. Even if Plaintiffs could. establish *a prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. Specifically, Defendant emphasizes again that A. Stoyanov never applied for the announced position.

Plaintiffs' primary response is that Defendants are "proffer[ing] pretext based on fraud" and that management lied in connection with the tasks at issue. (Paper No. 94 p. 37.) To support these assertions, however, Plaintiffs' rely on conclusory statements and declarations. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on the assigned tasks of picking-up antennae from Virginia and working on a test in the water channel and turbine tank tunnel.

**E. Change To A. Stoyanov's Work And Funding Allocation.**

In his Complaint, A. Stoyanov alleges that Stephen Farley ordered him to use his funding for a purpose to which he did not agree. Specifically, Farley asked A. Stoyanov to work on the 6. 1 project after Y. Stoyanov was transferred to the Structural Acoustics and Target Strength Branch. In addition, Farley ordered A. Stoyanov to charge his labor to the segment of the project that was assigned for publications and

materials. Defendant moves for summary judgment with respect to claims based on these employment decisions for the following reasons:

- Plaintiffs cannot establish a *prima facie* case of retaliation with respect to the change in work and funding allocation because a reasonable employee would not have Found Defendant's action materially adverse and because there is no causal connection between Plaintiffs' participation in the EEO process and the challenged action. Specifically, Defendant contends that these changes were not materially adverse to A. Stoyanov and amount to nothing more than "petty slights" or "minor annoyances." *Burlington,* 126 S.Ct.at 2415.
- Even if Plaintiffs could establish *a prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. Specifically, Defendant contends that A. Stoyanov's supervisors wanted the 6. 1 project to stay in Code 74 and that was the reason that A. Stoyanov was ordered to begin work on the project.

In response, Plaintiffs fail to explain how the challenged actions were materially adverse to A. Stoyanov. *(See* Paper No. 94 pp. 36-40.) In addition, Plaintiffs fail to forecast any evidence to support their claims of pretext. *(Id.)* Instead, Plaintiffs' rely on conclusory statements and declarations. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on the change in work and funding allocation experienced by A. Stoyanov.

**F. Farley's Denial Of A. Stoyanov's Travel Request.**

In May 2002, Stephen Farley denied A.

Stoyanov's travel request to an IEEE symposium. Defendant moves for summary judgment with respect to claims based on this employment decision for the following reasons:

. Plaintiffs cannot establish a *prima facie* case of retaliation with respect to the denial of this travel request because a reasonable employee would not have found Defendant's action materially adverse. Specifically, Defendant contends that A. Stoyanov's failure to attend the IEEE symposium did not affect his work or working conditions.

. Even if Plaintiffs could establish a *prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. Specifically, Defendant contends that Farley denied the travel request because: (1) the project on which A. Stoyauov sought to cover his travel expenses was a limited funding task, and such funding was intended for some of A. Stoyanov's labor not travel expenses; (2) A. Stoyanov could have ordered abstracts and papers presented at the symposium that applied to his project without having to actually attend the symposium and incur the cost of travel.

Plaintiffs' primary response is that the requested travel was needed for A. Stoyanov to complete a task that he had been assigned . *(See, e.g.* , Paper No. 94 p. 42.) However, Plaintiffs rely on conclusory statements and declarations to support their claims. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on the denial of A. Stoyanov's travel request to an IEEE symposium.

**G. Farley's Request That A. Stoyanov**

**Submit Daily Work Summaries.**

Stephen Farley requested that A. Stoyanov's submit daily work summaries. Defendant moves for summary judgment with respect to claims based on this employment decision for the following reasons:

- Plaintiffs cannot establish *a prima facie* case of retaliation with respect to the denial of this travel request because a reasonable employee would not have found Defendant's action materially adverse. Specifically, Defendant contends that all employees in A. Stoyanov' s code were required to submit daily work summaries if they were working on overhead and that completing the list took only a few minutes or less each day. Defendant notes that at least one other employee—Aimando Luna—had to submit a summary list of his work activities on a weekly basis.
- Even if Plaintiffs could establish *a prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. Specifically, Defendant contends that management was constantly asking why A. Stoyanov was performing overhead work and he was the only employee on 100% overhead in Farley's branch. Moreover, Farley did not know what A. Stoyanov was working on because he kept his door shut.

Plaintiffs' primary response is that Defendant's suggested reasons are pretext and that management lied. *(See, e.g.* , Paper No. 94 p. 43 .) However, Plaintiffs rely on conclusory statements and declarations to support their claims. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on Stephen Farley's request that A.

Stoyanov's submit daily work summaries.

## H. Threat Of Discipline To A. Stoyanov In September 2002.

In his Complaint, A. Stoyanov alleges that he was threatened with discipline in September 2002. Defendant moves for summary judgment with respect to claims based on this employment decision for the following reasons:

- Plaintiffs cannot establish *a prima facie* case of retaliation with respect to the threat of discipline because a reasonable employee would not have found. Defendant's action materially adverse. Specifically, Defendant contends that the threat of discipline was never acted upon.
- Even if Plaintiffs could establish *a prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. Specifically, Defendant contend that one of A. Stoyanov' s supervisors—James King—informed him that he was to be the P1 on a project and that Y. Stoyanov could provide support. A. Stoyanov responded that Y. Stoyanov had done the prior work and that he knew nothing about it. A. Stoyanov told his supervisors that he believed the work assignment was wrong, that he knew nothing about it, and that he consulted his brother about it and was going to appeal toanother supervisor. King then advised A. Stoyanov that his refusal of King' s direct instruction was insubordinate and that discipline was appropriate but that he wanted him to get to work on the project and not delay.

Plaintiffs' primary response is that Defendant's suggested reasons are pretext and that management lied. *(See, e.g.* , Paper No. 94 pp. 37-38.) However, Plaintiffs rely on conclusory statements and

declarations to support their claims. *See Burns, 96* F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on A. Stoyanov allegation that he was threatened with discipline in September 2002.

**I. Denial Of Purchase Of New Computer.**

A. Stoyanov requested that Stephen Farley purchase a new computer for him when his computer expired in May 2002. Farley offered, but did not purchase, a new computer for A. Stoyanov. Defendant moves for summary judgment with respect to claims based on this employment decision for the following reasons:

. Plaintiffs cannot establish a *prima facie* case of retaliation with respect to the denial of purchase of a new computer because a reasonable employee would not have found Defendant' s action materially adverse and because there is no causal connection between Plaintiffs' participation in the EEO process and the challenged action. Specifically, Defendant contends that A. Stoyanov located a used computer from another office that he could use. In addition, Defendant contends that A. Stoyanov had project funding in May 2002 that he could have used to purchase a new computer. Defendant also contends that Fancy did not buy A. Stoyanov a new computer because A. Stoyanov called him incompetent and accused Farlcy of mis-managing funds, not because A. Stoyanov had filed an employment discrimination claim.

Plaintiffs' primary response is that Defendant's suggested reasons are pretext and that management lied. *(See, e.g.* , Paper No. 94 pp. 40-4 1 .) However, Plaintiffs rely on conclusory statements and

declarations to support their claims. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on Stephen Farley's denial of A. Stoyanov's request for a new computer.

**J. Change In Y. Stoyanov's Work Assignment In September-December 2001.**

In his Complaint, Y. Stoyanov alleges that his work assignment was changed in September-December 2001. *(See* Y. Stoyanov Compl. ¶ 84.5 .) Defendant moves for summary judgment with respect to claims based on this employment decision for the following reasons:

- Plaintiffs cannot establish *a prima facie* case of retaliation with respect to the change in Y. Stoyanov's work assignment because a reasonable employee would not have found Defendant's action materially adverse. Specifically, Defendant contends that although this meeting may have inconvenienced Y. Stoyanov, such inconveniences or annoyances arc insufficient to support a claim of retaliation. *See Burlington,* 126 5 Ct. at 2415.
- Even if Plaintiffs could establish *a prima fade* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. Specifically, Defendants contend that Y. Stoyanov was available, had clearance to enter Building 15, and other employees were similarly assigned. *(See* Paper No. 87 p. 43 n. 19.)

Plaintiffs do not offer any substantial response to these arguments in their opposition papers. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on the change in Y. Stoyanov's work

assignment in September-December 2001.

**K. Y. Stoyanov's Claim That His Supervisors Interfered With His Work.**

In his Complaint, Y. Stoyanov alleges that his work was interfered with beginning in April 2000. Specifically, Y. Stoyanov alleges that Stephen Farley "called meetings to discuss the work status but was incompetent to understand phenomenology of radar measurements at near and far ranges." (Y. Stoyanov Compl. ¶ 50.) Defendant moves for summary judgment with respect to claim.s based on this employment decision for the following reasons:

- Plaintiffs cannot establish *a prima facie* case of retaliation with respect to the change in Y. Stoyanov's work assignment because there is no causal connection between Y. Stoyanov's participation in the EEO process and the challenged action. Specifically, Defendant points out that Y. Stoyanov did not seek EEO counseling until February 4, 2002, two months *after* the challenged action.
- Even if Plaintiffs could establish *a prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. Specifically, Defendants contend that Farley was Y. Stoyanov's supervisor and Y. Stoyanov should have expected his supervisors to be kept informed as to the projects on which he worked. Defendant also points out that there is no evidence that Farley was motivated by any sort of discriminatory motive.

Plaintiffs do not offer any substantial response to these arguments in their opposition papers. Accordingly, Defendant' s Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on the change in Y. Stoyanov's work

assignment in September-December 2001.

### L. Y. Stoyanov's Claim That He Was Denied Directly Funded Work, Excluded From Managing Projects, And Not Assigned Positions Of Higher Responsibility.

Y. Stoyanov claims that he was denied directly funded work, excluded from managing projects, and was not assigned to positions of higher responsibility.[7] Defendant moves for summary judgment with respect to claims based on these employment decisions for the following reasons:

. Y. Stoyanov cannot establish *a prima facie* case of retaliation because a reasonable employee would not have found Defendant's actions materially adverse and because there is no causal connection between Y. Stoyanov's participation in the EEO process and any of the challenged actions. Specifically, Defendant contends that: (1) Y. Stoyanov was *not* denied directly funded work, excluded from managing projects, and not assigned to positions of higher responsibility; (2) Y. Stoyanov received directly funded work in FY2001 and FY2002; and (3) Y. Stoyanov was assigned to manage projects and positions of higher responsibility, including leading the SHF Athena antenna project in 1996-1 997. In addition, Defendant notes that one of Y. Stoyanov's

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[7] Defendant represents that "[a]n employee can be funded in two ways: overhead funding or direct funding. Overhead funding comes out of the Division's overhead. Direct funding is derived from specific work funded by a Division sponsor. Senior Engineers are expected to develop sponsors and acquire direct funding." (Paper No. 87 p. 32 n.8.)

> supervisors explained that Y. Stoyanov "would be assigned to projects with a higher level of responsibility, but if Y. Stoyanov could not be the project leader, he did not want to work on the project." (Paper No. 87 p. 45 (citation omitted).)
>
> Even if Y. Stoyanov could establish *a prima facie* ease, Defendant has articulated legitimate, non-discriminatory reasons for the challenged actions. Specifically, Defendant contends that: (1) directly funded work was not assigned by Y. Stoyanov's supervisors; (2) neither King nor Fancy controlled which employees received directly funded work; (3) Y. Stoyanov's work was sometimes sub-par in terms of performance and delivering useful products and managing assigned tasks; and (4) Y. Stoyanov experienced difficulty getting funded work because he submitted the same proposals time and time again, and such proposals were of no interest to sponsors or did not benefit the Navy.

Plaintiffs make three main points in response: (1) other employees with inferior qualifications received better treatment and were promoted to ND-S positions even though Plaintiffs were best qualified; (2) Plaintiffs' salary and benefits were reduced when they did not receive demo points; and (3) Navy officials lied to cover-up intentional discrimination. *(See* Paper No. 94 pp. 32-35.) With the exception of Russell and Young (which are discussed in Section C above), the promotions that Plaintiffs rely on all occurred *before* Plaintiffs' sought EEO counseling. As a result, Plaintiffs cannot ground their retaliation claims on these employment decisions. With respect to matter of demo points, this Court previously rejected—and Plaintiffs have not forecast any evidence to support—that claim. *(See* Paper No. 36 pp. 15- 17 .) With respect

to the claim that Navy officials lied, Plaintiffs support their assertion with nothing more than conclusory statements and declarations. *See Burns, 96* E.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Y. Stoyanov's claims that he was denied directly funded work, excluded from managing projects, and was not assigned to positions of higher responsibility.

**M. Hiring Of Mirotznick.**

In his Complaint, Y. Stoyanov alleges that the hiring of Mark Mirotznick in October 2001 was done in retaliation for Y. Stoyanov's participation in EEO activity. *(See* Y. Stoyanov Compl. ¶ 84(13).) Y. Stoyanov also complains that Mirotznick was given directly funded work and an exception to the core hours provisions. Defendant moves for summary judgment with respect to claims based on this employment decision for the following reasons:

- Plaintiffs cannot establish *a prima facie* ease of retaliation because there is no causal connection between Y. Stoyanov's participation in the EEO process and the challenged action. Specifically, Defendant points out that Mirotznick was hired on a part-time basis in October 2001 , approximately four months *before* Y. Stoyanov first engaged in protected activity.
- Even if Plaintiffs could establish *a prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. Specifically, Defendants contend that Mirotznick was hired for his expertise in electromagnetics, his affiliation with Catholic University, and a perceived belief that his presence would make it easier to obtain funding

to cover work from certain sponsors.
Plaintiffs' response simply does not forecast sufficient evidence. *(See, e.g.* , Paper No. 94 pp. 32-35.) In addressing Mirtoznick's hiring, Plaintiffs assert a series of conclusory statements and rely on declarations no different in kind than those that have been addressed above. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848, Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on the hiring ofMark Mirotznick.

**N. Y. Stoyanov's Transfer From RF Technology Branch To The Structural Acoustics And Target Strength.**

In his Complaint, Y. Stoyanov afleges that his transfer from the RF Technology Branch to the Structural Acoustics and Target Strength Branch was discriminatory. *(See* Y. Stoyanov Compi. ¶¶ 6, 82-83, 84(8), 84(1O)-(12), & 84(18).) Y. Stoyanov also complains about the denial of his request to be transferred back to the RF Technology Branch. Defendant moves for summary judgment with respect to claims based on these employment decisions for the following reasons:

- Plaintiffs cannot establish *a prima facie* case of retaliation with respect to these transfer matters because a reasonable employee would not have found Defendant's actions materially adverse.
- Even if Plaintiffs could establish *a prima facie* case, Defendant has articulated legitimate, non-discriminatory reasons for the challenged action. Specifically, Defendants contend that management was experiencing difficulty securing directly funded work for some of the

> employees in the BY Technology Branch, including Y. Stoyanov, and the Structural Acoustics and Target Strength Branch had more than adequate directly funded work. In addition, Y. Stoyanov had been on overhead for a long time and his background was useful in the Structural Acoustics and Target Strength Branch. Defendant also points out that *after* the transfer, $95,000 in prospective funding was redirected to A. Stoyanov in the RF Technology Branch, which meant that Y. Stoyanov's transfer resulted in Plaintiffs receiving directly funded work. Finally, Defendant points out that Y. Stoyanov's request to transfer back was denied because Y. Stoyanov had been involved with acoustics work and was needed to complete the project.

In response, Plaintiffs argue that: (1) the reasons proffered by Defendant are pretext for discrimination; (2) Y. Stoyanov had funding in March and April 2002; (3) management lied about the funding; and (3) there was funding in Code 74. *(See, e.g.,* Paper No. 94 pp. 38-40 & 44-48.) Plaintiffs fail, however, to furnish sufficient evidence to support these claims. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Accordingly, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' claims based on the transfer of Y. Stoyanov from the RE Technology Branch and the denial of his request for a transfer back.

### VI. Motion For Leave To File Rebuttal.

Also pending in this action is Plaintiffs' Motion for Leave to File Rebuttal. *(See* Paper No. 1 01 .*)* This motion is a sur-reply and, as this Court has previously explained to Plaintiffs, sur-reply memoranda are

generally not permitted under the Local Rules. *See* Local Rule 105.2(a) (D. Md. 2004). In this case, Plaintiffs fail to articulate sufficient grounds for the proposed sur-reply. Accordingly, Plaintiffs' Motion for Leave to File Rebuttal is DENIED.

## CONCLUSION

For the reasons stated above, Defendant's Motion for Judgment on the Pleadings or, in the Al.temative, for Summary Judgment is GRANTED and. Plaintiff's Motion for Leave to File Rebuttal is DENIED. As a result, this consolidated action will be CLOSED. A separate Order follows. Dated: August 15, 2007

/s/
Richard D. Bennett
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEKSANDR J. STOYANOV,
Plaintiff *pro se,*

v.

Civil Action No.: RDB-05-1567

DONALD C. WINTER,
SECRETARY OF THE NAVY, *et all,*
Defendants.

YURI J. STOYANOV,
Plaintiff *pro se,*

v.

Civil Action No.: R1JB-05-1611

DONALD C. WINTER,[1]
SECRETARY OF THE NAVY, *et at,*
Defendants.

MEMORANDUM OPINION

These actions arise out of complaints that Aleksandr J. Stoyanov and Yuri J. Stoyanov (Plaintiffs) filed against Donald C. Winter, Secretary of the Navy, Gary M, Jebsen, James H. King, John C. Davies, Stephen M. Farley, and David Caron (collectively, "Defendants"). The Complaints allege that, *inter cilia,* Defendants discriminated against Plaintiffs because of their national origin and age in violation of Title VII of the Civil Rights Act of 1 964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") and the Age Discrimination in Employment Act, 29 U.S.C. § 621, et *seq.* ("ADEA"). The Complaints also allege that Defendants retaliated against Plaintiffs for complaining about discrimination. Pending before this Court are four motions: Defendants' Motions to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) ofthe Federal Rules of Civil Procedure or, in the Alternative, for Summary Judgment pursuant to Rule 56, and Defendants' Motions to Strike Plaintiffs' Sur-Replies. The parties' submissions have been reviewed and no hearing is necessary. *See* Local Rule *105.6* (D. Md. 2004). For the reasons stated below, Defendants'

[1] These actions were filed against former Secretary of the Navy Gordon R. England. On January 3, 2006, Donald C. Winter became Secretary of the Navy. Pursuant to Fed. R. Civ. P. *25(d)(l),* Secretary Winter is automatically substituted for Secretary England.

Motions to Dismiss or, in the Alternative, for Summary Judgment are GRANTED-IN-PART and DENIED-IN-PART, and Defendants' Motions to Strike are GRANTED. As a result, these actions will proceed with respect to a subset of Plaintiffs' discrimination claims based on national origin, age, and retaliation.

## BACKGROUND

### I. Factual Background.

Plaintiffs are twin brothers who were born in Russia on April 7, *1955*. In 1984, Plaintiffs became United States citizens. In 1989, Plaintiff Aleksandr J. Stoyanov ("A. Stoyanov") began working as a scientist at the Department of the Navy's Naval Surface Warfare Center, Carderock Division ("NSWCCD") in West Bethesda, Maryland.[2] In 1987, Plaintiff Yuri J. Stoyanov ("Y. Stoyanov") began working as a scientist at NSWCCD. A. Stoyanov's employment was terminated on or about November 1 8, 2003 . (A. Compl. ¶ 6.) At all times relevant to his claims, Y. Stoyanov worked at NSWCCD. (Y. Compi. ¶ 6.)
During their employment, Plaintiffs were supervised by Stephen M. Farley ("Farley"), Branch Head ofthe Radio Frequency Technology Branch, James H. King ("King"), Head of the Electromagnetic Signature Technology Department, John C. Davies ("Davies"), Deputy Head of the Electromagnetic Signature Technology Department, and Gary M. Jebsen ("Jebsen"), acting Head of the Signature Directorate. (*See* A. Compl. ¶ 10-13; Y. Compl. ¶ 10-13.) Plaintiffs

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[2] NCWCCD is "a Navy Working Capitol Funded Organization, meaning that it receives its working funds from the work it performs for its sponsors (either the government or private industry)." (Defs' Mem. (05-161 1) p. 2 n.2.)

named each of these individuals, as well as David Caron ("Caron"), Assistant Counsel to NSWCCD, as Defendants in these matters. *(Id.)*

Plaintiffs allege that "[alt all relevant times [they] received favorable performance evaluations and performed [their] job in a superb manner receiving performance and service awards for outstanding service and exemplary performance." (A. Compl. ¶ 28; Y. Compl. ¶ 27.) Plaintiffs also contend, however, that they were reassigned, passed over for promotion, required to work undesirable schedules, assigned menial tasks inconsistent with their assigned duties, and threatened with discipline. *(See, e.g.* , A. Compl. ¶ *29-95* ; Y. Compl. ¶ 28-98.) Where relevant to Plaintiffs' causes of action, the facts alleged in the Complaints are discussed below. *See* Discussion *infra.*

## II Procedural History.

On February 4, 2002, Plaintiffs sought Equal Employment Opportunity counseling.[3] On or about March 19, 2002, they filed Formal Complaints of Discrimination against the Navy.[4] An investigation was commenced, discovery was conducted, and eventually dispositive motions were filed.[5] On June 19, 2003, Administrative Judge David Norken issued a preliminary bench decision rejecting most of Plaintiffs'

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[3] (Defs' Mem. *(05-161* 1 & *05-1567)* Ex. 1 at Exs. B-l & B-2; *see also* A. Compl. ¶*58;* Y. Compl. ¶ 116 & *59.)*

[4] (Defs' Mem. (05-1611 & 05-1567) Ex. 1 at Ex. A-I; *seealso* A. Compl. ¶ 60; Y. Compl. ¶ 60 (suggesting that Y. Stoyanov filed his Formal Complaint on March 14, 2002).)

[5] Defendants indicate that discovery and motions practice were extensive. *(See* Defs' Mem. p. 1 1 ("During the discovery period, approximately twelve depositions were completed and approximately 50 motions were filed.").)

claims.[6] A hearing was conducted with respect to Plaintiffs' surviving claims. With respect to Y. Stoyanov's claims, Judge Norken issued an Order Entering Judgment in August 2003 that rejected all ofY. Stoyanov's claims. *(See* Defs' Mem. (05-1611) Ex. 7.). With respect to A. Stoyanov's claims, Judge Norken issued a final decision in August 2003 that incorporated the conclusions of his June 1 9 bench decision. *(See* A. Compl. Attach. 1.) He found discrimination with respect to only one of A. Stoyanov's claims—i.e., that on May 20, 2002, the Agency cancelled the purchase of a personal computer for A. Stoyanov in retaliation for participation in protected activity. *(Id.)* In September 2003 , after a subsequent hearing on compensatory damages, Judge Norken issued an Order Entering Judgment providing that:

> [Judgment in the above-captioned matter is hereby entered in favor of the [A. Stoyanov] with respect to his claim of discrimination on the basis of reprisal for prior EEO activity when the Agency, on May 20, 2002, cancelled purchase of a personal computer which [A. Stoyanov's] supervisor had promised him. . . . [J]udgment is otherwise entered in favor of the Department of the Navy with respect to all other claims and issues in this case.

*(Id.)* Plaintiffs noted an appeal to the Equal Employment Opportunity Commission's Office of Federal Operations ("EEOC-OFO"). On March 29, 2005, the EEOC-OFO affirmed Judge Norken' 5 final

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[6] *(Compare* Defs' Mem. p. 11 (indicating that Judge Norken rejected all but one of A. Stoyanov's claims) *with* A. Opp. p. 1 1 n.4 and Ex. 3, p. 4 (indicating that Judge Norken rejected all but four of A. Stoyanov's claims) *and* A. Compi. Attach. I p. 3 (same).)

orders.[7] *(See* A. Compl. Attach. I.)

On June 10, 2005, A. Stoyanov filed a Complaint in this Court that was assigned Civil Action No. 05-1567. On November 12, 2005, Defendants filed a Motion to Dismiss pursuant to Rules l2(b)(1) and 12(b)(6) ofthe Federal Rules of Civil Procedure or, in the Alternative, for Summary Judgment pursuant to Rule *56.* (Paper No. 23.) On January 13, 2006, Defendants filed a Motion to Strike Plaintiffs Sur-Reply. (Paper No. 32.)

On June 14, 2005, Y. Stoyanov filed a Complaint in this Court that was assigned Civil Action No. 05-161 1. On October 12, 2005, Defendants filed a Motion to Dismiss pursuant to Rules 12(b)(l) and 12(b)(6) of the Federal Rules of Civil Procedure or, in the Alternative, for Summary Judgment pursuant to Rule 56. (Paper No. 1 *9.)* On January 1 3, 2006, Defendants filed a Motion to Strike Plaintiffs Sur-Reply. (Paper No. 28.) Discovery has not commenced in either matter.[8]

## STANDARD OF REVIEW

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[7] The EEOC-OFO ordered the Navy to pay A. Stoyanov $ 1 ,000 in non-pecuniary compensatory damages, provide A. Stoyanov with a personal computer, and "take corrective, curative, and preventive actions to ensure that violations of Title VII and the ADEA will not recur, including, but not limited to, providing four (4) hours of training, with special emphasis on retaliation, to the agency officials involved in the above mentioned complaint." (Compl. Attach. 1 p. 8 )

[8] Plaintiffs have initiated separate actions against Defendants for a variety of discrimination claims. *See* Civil Action Nos. RDB 05-28 19, RDB 06-1245, and RDB 06-1244. Some of these actions may ultimately be consolidated and others stayed pending the resolution of Civil Action Nos. RDB 05-1567 and 05-1611.

## I. Motions to Dismiss.

### A. Fed. R. Civ. P. 12(b)(1).

The plaintiffhas the burden ofproving that subject matter jurisdiction exists. *See Richmond, Fredericksburg & Potomac R. Co.* v. *United States, 945* F.2d 765, 768 (4th Cir.1991). When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), "the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Id.* The district court should grant the Rule 12(b)(l) motion to dismiss "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.*

### B. Fed. R. Civ. P. 12(b)(6).

Defendants seek to dismiss Plaintiffs' actions pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As the legal sufficiency of the complaint is challenged under a Rule 12(b)(6) motion, the court assumes "the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations." *Eastern Shore Mkts.* v. *J.D. Assocs. Ltd. P'sh4,* 213 F.3d 175, 180 (4th Cir. 2000) *(citing Hishon* v. *King & Spalding,* 467 U.S. *69,* 73 (1984)). A Rule 12(b)(6) motion to dismiss "should only be granted if, after accepting all well-pleaded allegations in the plaintiffs complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Migdal* v. *Rowe Price-Fleming Int'l Inc.,* 248 F.3d 321, 325 (4th Cir. 2001); *see also Venkatraman* v. *REI Sys., Inc.,* 417 F.3d 418, 420 (4th Cir. 2005). Furthermore, the "Federal Rules of Civil Procedure do

not require a claimant to set out in detail the facts upon which he bases his claim." *Conley* v. *Gibson,* 355 U.S. 41, 47 (1957). Rather, Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Migdal,* 248 F.3d at 325-26; *see also Swierkiewicz* v. *Sorema* NA., 534 U.S. 506, *5* 13 (2002) (stating that a complaint need only satisfy the "simplified pleading standard" of Rule 8(a)). However, while "notice pleading requires generosity in interpreting a plaintiffs complaint . . . generosity is not fantasy." *Bender* v. *Suburban Hosp., Inc.* , *159* F.3d 186, 191 (4thCir. 1998).

In reviewing the complaint, the court accepts all well-pleaded allegations of the complaint as true and construes the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff *Venkatraman,* 41 7 F.3d at 420; *Ibarra v. United States,* 120 F.3d 472, 473 (4th Cir. 1997); *Mylan Labs., Inc.* v. *Matkari,* 7 F.3d 1 130, 1 134 (4th Cir. 1993). The court must disregard the contrary allegations ofthe opposing party. AS. *Abell Co.* v. *Chell,* 412 F.2d 7 12, 7 15 (4th Cir. 1969). However, in considering a motion to dismiss, the court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments" nor "the legal conclusions drawn from the facts." *Eastern Shore Mkts., Inc.,* 2 1 3 F.3d at 1 80; *see also Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp.,* 329 F. Supp. 2d 574, 578 (D. Md. 2004).

## II. Motions for Summary Judgment.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine*

issue as to any *material* fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. *56(c)* (emphasis added). In *Anderson* v. *Liberty Lobby, Inc.* , 477 U.S. 242 (1986), the Supreme Court explained that only "facts that might affect the outcome of the suit under the governing law" are *material. Id.* at 248. Moreover, a dispute over a material fact is *genuine* "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The court further explained that, in considering a motion for summary judgment, a judge's function is limited to determining whether sufficient evidence supporting a claimed factual dispute exists to warrant submission of the matter to ajury for resolution at trial. *Id.* at 249. In that context, a court must consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

"Once the movant has established the absence of any genuine issue of material fact, the opposing party has an obligation to present some type of evidence to the court demonstrating the existence of an issue of fact." *Pension Ben. Guar. Corp. v. Beverley,* 404 F.3d 243, 246-47 (4th Cir. 2005) (citing *Pine Ridge Coal Co.* v. *Local 8377, UIVIW,* 187 F.3d 415, 422 (4th Cir. 1999)). Thus, Rule *56* mandates summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's ease, and on which that party will bear the burden of proof at trial. " *Celotex Corp.* , 477 U.S . at 322 . If the evidence presented by the nonmoving party is merely colorable, or is not significantly probative, summary judgment must be granted. *Anderson,* 477 U.S. at *249-50.* Similarly, the existence of a mere

"scintilla" of evidence in support of the nonmoving party's case is insufficient to preclude an order granting summary judgment. *Id.* at 252.

A genuine issue of material fact may exist if the evidence presented to the court is sufficient to indicate the existence of a factual dispute that could be resolved in favor ofthe non-moving party at trial. *Rachael-Smith* v. *FTDATA, Inc.*, 247 F. Supp. 2d 734, 742 (D. Md. 2003) (citing *Anderson,* 477 U.S. at 248-49). Moreover, any inferences drawn from disputed evidence must be accorded to the non-moving party. *See Matsushita,* 475 U.S. at *587-88; E.E.O C.* v. *NavyFederal Credit Union,* 424 F.3d 397, 405 (4th Cir. 2005).

## DISCUSSION

### I. Plaintiffs' Causes of Action.

Plaintiffs demand in excess of $64,000,000 in connection with the following claims:

| Count | Claim |
|---|---|
| I | Discrimination (National Origin): Defendants Donald C. Winter, Secretary ofthc Navy (the "Secretary of the Navy"), Gary M. Jebsen ("Jebsen"), James H. King ("King"), John C. Davies ("Davies), and Stephen M. Farley ("Farley") discriminated against Plaintiffs on the basis of national origin in violation of Title VII. (A. Compl. ¶ 96-102; Y. Compl. ¶ *99*-105.) |
| II | Retaliation: Defendants Jebsen, King, Davies, and Farley, in conspiracy with David Caron ("Caron), retaliated against Plaintiffs for participating in "EEO discrimination complaint activity" in violation of Title VII. (A. Compl. ¶~J 103-06; Y. Comp. ¶ 106-09.) |

| | |
|---|---|
| III | Discrimination (Age): Defendants discriminated against Plaintiffs on the basis of age in violation of the ADEA. (A. Compl. ¶ 107-09; Y. Compl. ¶ 101-12.) |
| IV | "Human Rights": Defendants Jebsen, King, Davies, Farley and Caron discriminated against Plaintiffs "in violation of [their] right to equal employment opportunity as protected by the Human Rights Law, § 296, *etseq.*" (A. Compl. ¶ 110-13; Y. Compl. ¶ 113-16.) |
| V | Conspiracy: Defendants conspired to discriminate against them on the basis of national origin, age, and retaliation for participating in EEO complaint activity. (A. Compl. ¶ 114-18; Y. Comp. ¶ 117-21.) |
| VI | Aiding and Abetting: Each Defendant has aided and abetted the unlawful conduct alleged in Counts I-V. (A. Compl. ¶ 119-23; Y. Compl. ¶ 122-26.) |
| VII | Obstruction of Process: Defendants Jebsen, King, Davies, Farley, and Caron "obstructed and impeded official processes in violation of 18 U.S.C. § 1512" in connection with the discriminatory conduct alleged in prior counts. (A. Compl. ¶ 124-26; Y. Comp. ¶ 127-29.) |
| VIII | Abuse of Administrative Power: Defendants Jebsen, King, Davies, Farley, and Caron "misused and interfered with administrative processes" in connection with the discriminatory conduct alleged in prior counts. (A. Compl. ¶ 127-29; Y. Comp. ¶ 130-32.) |
| IX | Intentional Infliction of Emotional Distress: Defendants Jebsen, King, Davies, Farley, and |

| | |
|---|---|
| | Caron intentionally subjected Plaintiffs to emotional distress by engaging in the discriminatory conduct alleged in prior counts. (A. Compl. ¶130-32; Y. Comp. ¶ 133-35.) |
| X | Fraud and Misrepresentations: Defendants Jebsen, King, Davies, Farley, and Caron "used intentional misrepresentations" and engaged in fraudulent conduct in connection with the discriminatory and retaliatory conduct alleged in prior counts. (A. Compl. ¶ 133-41; Y. Comp. ¶ 136-44.) |
| XI | Malicious Abuse of Process: Defendants "failed to maintain a proper system for immediate resolution of intentional discrimination" and "maliciously and intentionally abused supervisory position[s] and disciplinary process[es]" by engaging in the discriminatory conduct alleged in prior counts. (Compl. ¶ 142-54; Y. Comp. ¶ 145-57.) |

**II. Individual Defendants.**

Defendants contend that this Court lacks jurisdiction over the individual federal employees named as defendants in these actions—i. *e.* , Jebsen, King, Davies, Fancy, and Caron—and moves to dismiss these individuals with respect to Plaintiffs' Title VII claims and substitute the United States in their place with respect to Plaintiffs' tort claims. *(See* Defs' Mem. Supp. Mot. pp. *14-15.)*

Title VII does not support employment discrimination claims against individual federal employees. *See, e.g.*, 42 U.S.C. § 2000e-16(c) (authorizing civil actions in which "the head of the

department, agency, or unit, as appropriate, shall be the defendant"); *Newbold* v. *United States Postal Serv.*, 614 F.2d 46, 47 (5th Cir. 1980) (dismissing Title VII claims against individual federal employee), *cert. denied,* 449 U.S. 878 (1980). In addition, the Federal Tort Claims Act, 28 U.S.C. § 2671 , *et seq.* ("FTCA") shields individual federal employees from liability against torts where the allegedly "negligent or wrongful act or omission" occurs while the employee is "acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(l). In this case, Rod J. Rosenstein, United States Attorney for the District of Maryland, has certified that Jebsen, King, Davies, Farley, and Caron were acting within the scope of their employment at the time of the alleged tortious conduct. *(See* Defs ' Mem. Supp. Mot. Ex. 9.)

Plaintiffs suggest that Jebsen, King, Davies, Farley, and Caron are properly named under 42 U.S.C. § I 983 because "they made material misrepresentations to deprive Plaintiff of constitutional rights. . . ." *(See, e.g.* , A. Stoyanov's Opp. pp. 3-6 & *9.)* This argument fails for two reasons. First, Plaintiffs do not assert causes of action under § 1983 in their Complaints. Second, the allegations in Plaintiffs' Complaints are nothing more than allegations of employment discrimination. Because Title VII and the ADEA are the exclusive remedies available to federal employees asserting employment discrimination claims based on national origin, retaliation, and age, § 1983 is not available to support their claims against individual federal employees. *See* DISCUSSION § III, *infra* (explaining that Title VII and the ADEA are the exclusive remedies for Plaintiffs' job-related discrimination claims.).

For the reasons stated above, Jebsen, King, Davies,

Farley, and Caron are DISMISSED from Plaintiffs' claims under Title VII and the ADEA (Counts 1-Ill) for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(l).[9] In addition, the United States is SUBSTITUTED for Jebsen, King, Davies, Farley, and Caron with respect to Plaintiffs' tort claims (Counts V-VI & IX-XI) pursuant to 28 U.S.C. § 2679(d)(l).

## III. Tort Claims (Counts V-VI & IX-XI).

Defendants contend that Plaintiffs' tort claims should be dismissed for two reasons. First, Defendants claim that Plaintiffs failed to satisfy the requirement that an administrative claim be filed before initiating a lawsuit under the FTCA. *See, e.g.* , 28 U.S.C. § 2675(a) (mandating the filing of an administrative claim); *Henderson* v. *United States,* 785 F.2d 121, 123 (4th Cir. 1986) ("It is well-settled that the requirement of filing an administrative claim is jurisdictional and may not be waived. "); *Plyler* v. *United States,* 900 F.2d 41 , 42-43 (4th Cir. 1990) (same). Second, Defendants contend that the United States and its officers have not waived immunity with respect to Plaintiffs' intentional torts. *See, e.g.* , *Federal Deposit Ins. Corp.* v. *Meyer, 5* 10 U.S. 471 , 475 ( I 994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.") (citations omitted). In this regard, Defendants note that the FTCA's limited waiver of sovereign immunity does not extend to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution,

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[9] *See Arbaugh* v. *Y&HCorp., U.S.* ,1265. CL 1235, 1245n.11 (2006) (characterizing a statute that limits causes of actions to specific defendants as "jurisdictional"); 42 U.S.C. § 2000e-16(c) (requiring that a federal employee's Title VII claims must be asserted against "the head of the department, agency, or unit, as appropriate. . . .").

abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . ." 28 U.S.C. § 2680(h); *see also Tinch* V. *United States,* 189 F. Supp. 2d 313, 317 (D. Md. 2002) (applying 28 U.S.C. § 2680(h) to tort of intentional infliction of emotional distress).

Plaintiffs respond to Defendants' exhaustion argument by suggesting that notice was provided to Defendants during the underlying administrative process.[10] Defendants neither challenge Plaintiffs' affidavit nor argue that the allegations contained in those affidavits are insufficient as a matter of law to comply with the notice requirements under the

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[10] *(See, e.g.* , A. Stoyanov's Opp. p. 7 ("Plaintiff exposed Defendant Caron's criminal conduct and explained in motions and letters to the EEO Commission, Navy officials, and Office of Special Counsel (OSC) that Defendant Caron intentionally misrepresented facts, suborned agency witnesses, and conspired with agency officials to escalate discrimination against Plaintiff and Plaintiffs brother Dr. Yuri Stoyanov."); A. Stoyanov's Affidavit ¶ 45 ("My brother and I reported prohibited personnel actions and fraud committed by agency officials Mr. King, Mr. Farley, Mr. Caron and others to the Navy administration EEO Chief and Commander Captain S. Petri, to the Commander ofNAVSEA Admiral Balisle, to the Secretary of the Navy Mr. Gordon England and to the Secretary of Defense Mr. D. Rumsfeld."); Y. Stoyanov's Opp. p. 6 ("Plaintiff and his brother reported fraud and violations of EEO laws to the agency administration Commander of NSWCCD Captain Petri, Office of Special Counsel, and to Captain Petri's superior Admiral Balisle."); p. 8 ("Plaintiff specifically requested [the Office of Special Counsel] to start investigation of fraud with the transfer committed by Defendant King in conspiracy with subordinates; P's Ex. 1 , 2.") (citations omitted); Y. Stoyanov's Affidavit ¶ 5 1 ("The instant civil action includes my claims . . . [for] fraud, conspiracy, abuse of authority which were reported to the EEOC and also to the Office of Special Counsel since 2002 and through the chain of command within the Navy and the Department of Defense.").)

Federal Tort Claims Act. Instead, Defendants respond in general terms only. *(See, e.g.* , Defs' *(05-1567)* Reply p. 3 ("Stoyanov failed to comply with the requires [sic] of the Federal Tort Claims Act ... in presenting his tort claims.").) As a result, this Court cannot conclude that the material jurisdictional facts are not in dispute and that Defendants are entitled to prevail as a matter of law. *Richmond* v. *United States, 945* F.2d at 768. Accordingly, Defendants' Motion to Dismiss is DENIED with respect to Defendants' argument that Plaintiffs failed to satisfy the requirement that an administrative claim be filed before initiating a lawsuit under the FTCA.

Plaintiffs do not appear to respond to Defendants' argument that the United States and its officers have not waived immunity with respect to Plaintiffs' intentional torts. Specifically, Plaintiffs do not contend that Defendants somehow waived immunity with respect to the intentional torts asserted in this matter. Accordingly, Plaintiffs' intentional tort claims (Counts IX-XI) are DISMISSED for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

## IV. Title VII and ADEA—Exclusive Remedy (Counts IV-VIII).

Eight of the eleven causes of action asserted by Plaintiffs are *not* based on Title VII or the ADEA. Those causes of action are: violation of human rights laws (Count IV), conspiracy to discriminate (Count V), aiding and abetting in discriminatory conduct (Count VI), obstruction of process (Count VII), abuse of administrative power (Count VIII), intentional infliction of emotional distress (Count IX), fraud and misrepresentations (Count X), and malicious abuse of process (Count XI). Defendants maintain that these causes of action should be dismissed because each of

these counts are based on allegations of employment discrimination, and Plaintiffs' exclusive remedy for such claims is Title VII or the ADEA.

Title VII and the ADEA are the exclusive remedies available to a federal employee complaining of employment discrimination that is based on national origin, retaliation, and age. This conclusion stems from the Supreme Court's statement in *Brown* v. *General Services Administration* that Title VII "create[s] an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." 425 U.S. 820, 829 (1 976) The approach taken in *Brown* applies to national origin and retaliation claims under Title VII, as well as age-based discrimination claims under the ADEA.. *See, e.g., Briones* v. *Runyon,* 101 F.3d 287, 289 (2d Cir. 1996) (national origin); *White* v. *General Services Administration, 652* F.2d 913, 917 (9th Cir. 1981) (retaliation); *Paterson v. Weinberger,* 644 F.2d 521, *525* (5th Cir. 1981) (age).

In this case, each cause of action that is *not* asserted under Title VII or the ADEA arises from allegations of employment discrimination based on national origin, age, or retaliation. For example, Plaintiffs' claim under the "Human Rights Law" is based on the allegation that:

> Defendant Jebsen, Defendant Mr. King, Defendant J. Davies, Defendant Farley and Defendant Caron discriminated against the Plaintiff Dr. Stoyanov on account of his national origin and/or age in violation of his right to equal employment opportunity as protected by the Human Rights Law, § 296 *et. seq.*

(A. Compl. ¶ 111 ; Y. Compl. ¶ 114.) Substantially similar allegations form the basis of Plaintiff's other

non-Title VII and non-ADEA claims. *(See* A. Compl. ¶ 1 1 *5 ;* Y. Compl. ¶ 118 (job discrimination allegations form the basis of Plaintiffs' causes of action for conspiracy); A. Compl. ¶ 120; Y. Compl ¶ 123 (aiding and abetting); A. Compl. ¶ 125; Y. Compl. ¶ 128 (obstruction of process); A. Compl. ¶ 128; Y. Compl. ¶ 13 1 (abuse of administrative power); A. Compi. ¶ 13 1; Y. Compi. ¶ I 34 (intentional infliction of emotional distress); A Compi. ¶ 134-36; Y. Comp!. ¶ 1 37-39 (fraud and misrepresentations); A. Compi. ¶ 144-53; *Y.* Compi. ¶ *146-55* (malicious abuse of process).)

For the reasons stated above, Counts 1V-VTII are DISMISSED for failure to *state* a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6)[1111]. The gravamen of these causes of action is allegations of job-related discrimination based on national origin, retaliation, and age, and Plaintiffs' exclusive remedy for such claims is Title VII and the ADEA.[12]

## V. Employment Discrimination Claims.

### A. Exhaustion of Administrative Remedies.

Defendants maintain that any employment discrimination claims based on conduct that occurred before December 21 , 2001 , which is *45* days prior to the date that Plaintiffs sought Equal Employment Opportunity ("EEO") counseling, should be dismissed

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[11] The preclusive effect of Title VII and the ADEA would also extend to Counts IX-XI of Plaintiffs' Complaints if this Court had riot dismissed those claims for lack of subject-matter jurisdiction under Fed. R. Civ. P. l2(b)(l). *See* Discussion § 1V, *supra.*

[12] This Court notes that Plaintiffs' claims for obstruction of process (Count VII) is based on criminal statute 18 U.S.C. § 1512. This statute does not give rise to a civil cause of action, which is another reason for concluding that Count VII fails to state a claim upon which relief can be granted under Fed. R. Civ. P. i2(b)(ó).

for Plaintiffs' failure to exhaust their administrative remedies. *(See, e.g.,* Defs' Mem. (05-1567*)* pp. 18-21.)

Title VII requires a federal employee to exhaust administrative remedies before filing a lawsuit in federal court. *See* 42 U.S.C. § 2000c-l6(c); 29 C.F.R. § 1614.407. Among these administrative requirements, the employee "must initiate contact with a Counselor within 45 days of the date ofthe matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § l614.l05(a)(1). In this case, Plaintiffs first sought EEO counseling on February 4, 2002.[13] Plaintiffs nevertheless raise a number of employment discrimination claims based on conduct that occurred before December 2 1 , 2001, which is *45* days prior to February 4, 2002. Specifically:

- In or around I 997, A. Stoyanov was denied the position of Program Manager for the Komodo Project. *(See* A. Compl. ¶ 40-41.)
- In September 1998, Plaintiffs were denied the position of Program Manager for the 6.2 applied research and development program in ship electromagnetic signature technology. *(See* A. Compl. ¶ 35-39; Y. Compl. ¶ 37; *see id.* at ¶ 34-37.)
- In or around 1998, A. Stoyanov was denied the position of Task Leader of the LMS Project. *(See* A. Compl. ¶ 42-44.)
- In April 2000, Plaintiffs were denied the position of acting Branch Head in the radio frequency technology branch. *(See* A. Compl. ¶ 45-48; Y. Compl. ¶ 41-45 & 84.2.)
- From November 1989 to March 2001 , Plaintiffs

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[13] *(See A.* Compl. ¶ 58; A. Stoyanov's Aff. ¶ 39; Defs' Mem. *(05-1567)* Ex. 1 p. 1.; Y. Compl. ¶ *58;* Y. Stoyanov's Aff. ¶ 39; Defs' Mem. (05-1611) Ex. 1 p. 1.).)

were discriminated against in connection with the allegedly fraudulent promotions of Mr. R. Renfro (whose promotion occurred on November 12, 1989), Mr. J. Grizzard (June 12, 1994), Mr. W. Nicols (October 13, 1996), Mr. K. Wilson (November 8, 1 998), Mr. W. Stephens (June 1 8, 2000), Mr. G.Miller(March 11, 2001), and Mr. D. Vinh (March 1 1, 2001). *(See* A. Compl. ¶11 50 & 81.1; Y. Compl. ¶ 47, 84.21-84.24, & 84.26-84.27.)[14]

- From approximately April 2000 to February 200 1 , King and Farley discriminated against Plaintiffs by interfering with their work. *(See* A. Compl. ¶ *53-54;* Y. Compl. ¶ 49-53.).)
- In "FY 2000," Davies and Farley discriminated against Y. Stoyanov by denying him "incentive pay demo points. . . ." (Y. Compl. ¶ 54 & 84.19.)
- On April 26, 2001 , Y. Stoyanov was discriminated against when the transcript or notes from a meeting between Plaintiff, King, and Ms. Fowler were not released to Plaintiff. *(See* Y. Compl. ¶ 84.4 & 84.20.)

With respect to the above claims, Plaintiffs do not contend that they contacted an EEO counselor within 45 days of the alleged discriminatory event. Plaintiffs do, however, point out that "[t]he claims of intentional discrimination against Plaintiff[s] with regard to fraudulent promotions of Russell, Miller, Stephens, Renfro, Wilson, and Nichols were developed by reasonable investigation after filing original complaint in February 2002. . . . Plaintiff[s] timely raised these claims with the EEOC after investigation of documents requested by the OCI investigator and

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[14] Defendants do not appear to address Y. Stoyanov's allegation of discrimination with respect to the promotion ofMr. P. Honke. *(See* Y. Compl. ¶ *84.25.)*

thus these claims are part of the current civil action, Plaintiff[s'] Affidavit." (A. Stoyanov's Opp. pp. 33-34; Y. Stoyanov's Opp. p. 32; *see also* A. Stoyanov's Aff. ¶ 58.6; Y. Stoyanov's Aff. IT 61.6.) Defendants neither challenge Plaintiffs' affidavits nor argue that the allegations contained in those affidavits are insufficient as a matter of law to comply with the 45 day requirement under 29 C.F.R. § *1614.105(a)(l).* Instead, Defendants respond in general terms only. *(See, e.g.*, Dcfs' Reply p. 4 ("Stoyanov failed to adequately address the issue of whether portions of his claims should be barred because they were either filed untimely or not raised at the administrative level.").)[15]

The 45 day requirement under 29 C.F.R. § l614.lOS(a)(1) is extended under certain circumstances. *See* 29 C.F.R. § 16l4.t05(a)(2).[16] In the

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[15] Certain of the claims that Defendants contend should be dismissed for failure to exhaust administrative remedies were addressed in decisions issued by Administrative Judge Norkin and the Equal Employment Opportunity Commission's Office of Federal Operations ("EEOC-OFO"). Specifically, Judge Norkin and the EEOC-OFO considered the following claims: (a) in April 2000, the agency failed to select Plaintiffs as acting branch head in the RB technology branch, code 741 ; (b) A. Stoyanov's claims with respect to allegedly fraudulent promotions; and (c) Y. Stoyanov's claim that one of his supervisors failed to provide him with a copy of the notes from an April 26, 2001 meeting. *(See* A. Compl. Attach. 1 , pp. 1-2 & 5-6.)

[16] 29 C.F.R. § t614.l05(a)(2) provides:

> The agency or the Commission shall extend the 45-day time limit in paragraph (a)(l) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the

absence of additional briefing by the parties, this Court cannot conclude that—at least with respect to Plaintiffs' claims based on allegedly fraudulent promotions— "after accepting all well-pleaded allegations in the plaintiffs complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Migdal,* 248 F.3d at 325. Plaintiffs have alleged certain facts that, if true, might support a claim "that [they] did not know and reasonably should not have known that the discriminatory matter or personnel action occurred. " 29 C .F .R. § 16 1 4. 105(a)(2). The government has neither responded to Plaintiffs' allegations nor explained why they are insufficient as a matter of law. Accordingly, Defendants' Motions to Dismiss are DENIED with respect to Defendants' argument that Plaintiffs failed to satisfy the 45 day requirement under 29 C.F.R. § 1614. 105*(a)(l)* in connection with the fraudulent promotion claims summarized above.

With respect to the remaining claims Defendant has placed at issue, Plaintiffs neither contend that they contacted an EEO counselor within 45 days of the alleged discriminatory event nor suggest a sufficient basis for tolling or waiving the 45 day requirement under 29 C.F.R. § 1614. t *05(a)(1).* Accordingly, with the exception of the fraudulent promotion claims discussed above, Plaintiffs' employment discrimination claims that are based on alleged conduct occurring before December 21 , 2001 or 45 days prior to the date that Plaintiffs sought EEO counseling are DISMISSED for failure to exhaust administrative remedies under Fed. R. Civ. P. 12(b)(6). *See Zografov*

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counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

*v.* VA. *Medical Center,* 779 F.2d 967, *969* (4th Cir. 1985) (holding that failure to seek EEO counseling within specified time limit "is not a jurisdictional bar for federal employees seeking relief under Title VII. . . .").

**B. Claims Not Raised in EEO Complaint.**

Defendants assert that allegations made by Plaintiffs in their Complaints are barred because Plaintiffs failed to include those allegations in their EEO administrative complaints. *(See, e.g.* , Defs' Mem. (05-1567) pp. 21-22.) Two of those allegations—that A. Stoyanov was denied the positions of Program Manager for the Komodo Project in or around 1997 and Task Leader of the LMS Project in or around 1 998—are addressed above. *See* DISCUSSION § V.A, *supra.* The remaining allegations provide that:

> [A]gency officials deprived [Plaintiffs] of the rights clearly established and well-settled in the following Federal laws: the civil service laws as set in *5* U.S.C. § 2302 that forbid personnel actions based on the prohibited personnel practices and the civil service laws as set in *5* U.S.C. § 2301 requiring that federal personnel management be implemented consistent with the merit system principle.
>
> (A. Compl. ¶ 95; Y. Compl. ¶ 98.)
>
> In April/May 2002 Mr. Davies, acting as the department head of Code 74, harassed the Complainant and used deception and intentionally misrepresented facts to Ms. R. Johnson with regard to the involuntary transfer of the [Y. Stoyanov] from the Surface Ship Electromagnetics department Code 74 to the Submarine Acoustics department Code 72 as a result of discrimination in reprisal for participation in prior EEO activity and

on the bases of age and national origin.

(Y. Compl. ¶ 84.17.)

Defendants note that "[o]nly those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit." *Evans* v. *Tech. App. & Serv. Co.* , 80 F.3d *954, 962* (4th Cir. 1 996). Plaintiffs do not appear to contest that the allegations summarized above were not part of their initial EEO administrative complaints. Accordingly, Plaintiffs' discrimination claims based on *5* U.S.C. § 2301-2302 and Y. Stoyanov's discrimination claim based on that alleged harassment of Mr. Davies in April/May 2002 are DISMISSED for failure to exhaust administrative remedies under Fed. R. Civ. P. 12(b)(6)[17]

**C. McDonnell Douglas Burden Shifting Framework.**

Plaintiffs' primary support for the claim that

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[17] Plaintiffs' allegation with respect to *5* U.S.C. §2301-2302, moreover, appears to be nothing more than yet another allegation of job-related discrimination based on national origin, retaliation, or age. *Cf 5* U.S.C. § 2302(b)(l) (prohibiting supervisory employees from discriminating "for or against any employee or applicant for employment (A) on the basis of race, color, religion, sex, or national origin, as prohibited under [Title VII]; [or] (B) on the basis of age, as prohibited under [the ADEA]."). As this Court has already explained, Plaintiffs' exclusive remedies for the job-related discrimination claims in this matter are Title VII and the ADEA. *See* DISCUSSION § IV, *supra.*

there is direct evidence ofdiscrimination in the record consists of an email dated March 2, 2000 from James H. King to a number of individuals, including A. Stoyanov. *(See* Defs' Mem. (05-1567) Ex. 1 p. 4l4a.) The email provides:

> Yesterday, I mentioned the need to hire younger people. I also said that Ellie was preparing a chart which showed how our age is distributed. That chart is attached — *please do not pass it around*. I make several observations: (1) Our average age is 44. (2) I am above the average age. This is distressing! (3) Our age distribution is trimodal. This reflects hiring constraints—usually externally imposed. (4) There is a real paucity of employees in the 26 to 36 year age bracket. . . . I think that we need to take the risk [to hire when we are just making ends meet] because we cannot stand the age creep, we need to keep new employees coming in to overcome the loss of experience, and we need the fresh ideas, skills, and enthusiastic energy that new employees bring.

*(Id.* (emphasis in original).) This email, however, does not constitute direct evidence of discrimination. First, this email was sent well before Plaintiff first sought EEO counseling on February 4, 2002. *See Birkbeck v. Marvel Lighting Corp.* , 30 F.3d 507, 512 (4th Cir. 1994) ( statement made two years before disputed employment event too remote to use as direct evidence of age discrimination) (citations omitted). Second, the email alone "creates no inference of age bias . . . [and] reflects no more than a fact of life and as such is merely a 'truism[ ]' that carries with it no disparaging undertones." *Id.* (quoting *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980)). In sum, after reviewing the

material cited by Plaintiffs, this Court concludes that Plaintiffs have not presented any direct evidence of discrimination based on age or national origin.

In the absence of direct evidence of discrimination, Plaintiffs do not dispute that the familiar three-step burden-shifting model of circumstantial evidence of discrimination set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 41 1 U.S . 792, 802 (1973) applies to this case. *(See* A. Stoyanov's Opp. pp. 1 0-50 (applying the *McDonnell Douglas* framework to job-related discrimination claims); Y. Stoyanov's Opp. pp. 9-50 (same).) Although this burden-shifting framework was established in the context of Title VII, courts have applied the same analysis to age-based discrimination claims under the ADEA. *See, e.g.* , *Caussade v. Brown,* 924 F. Supp. 693, 698 (D. Md. 1996), *afj'd* 107 F.3d 865 (4th Cir. 1997) (citing *Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230, 239 (4th Cir. 1982)). As a result, each of Plaintiffs claims for employment discrimination, including his age-based claim under the ADEA, is subject to the *McDonnell Douglas* burden-shifting scheme.

To establish a cause of action for discriminatory discharge, the plaintiff bears the initial burden of proving *a prima facie* case of discrimination. *McDonnell Douglas,* 41 1 U.S. at 802. There are specific elements that must be satisfied under both a Title VII and ADEA analysis in order for the plaintiff to meet this initial burden. If *a prima facie* case is established, the burden then shifts to the defendant to rebut the inference. *McDonnell Douglas,* 41 1 U.S. at 802. While the defendant's burden is not onerous, it must articulate "some legitimate, nondiscriminatory reason" for the disparate treatment. *Id.* In this regard,

the Court "does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination" so that "when an employer articulates a reason for [its treatment of the plaintiff] not forbidden by law, it is not [the court's] province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the [employment decision]." *Defarnette v. Corning, Inc.*, 133 F.3d 293, 298-299 (4th Cir. 1998) (internal quotations and citations omitted).

If the defendant articulates a legitimate, non-discriminatory reason for its conduct, the ultimate burden shifts to the plaintiff to show that the defendant's stated reason is "pretext." *McDonnell Douglas*, 41 1 U.S . at 804. In evaluating whether the plaintiff has adduced a sufficient quantity of proof, the court may consider the relative strength of the employer's asserted nondiscriminatory reasons. *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 732 (4th Cir.1996). However, unsubstantiated allegations and bald assertions will not carry the day for the employee. *Evans v. Tech. App. & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996); *see also Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988) (naked opinions and conclusory allegations are insufficient to withstand summary judgment). If the plaintiff cannot present facts that would permit a reasonable inference that the stated reason is a pretext for discrimination, summary judgment in favor of the defendant should be granted. *See Rowe* v. *Marley Co.* , 233 F.3d 825, 830 (4th Cir. 2000) (citing Reeves *v. Sanderson PlumbingProds., Inc.*, 530 U.S. 133, 146-47 (2000)).

In this case, Plaintiffs assert claims for discrimination based on national origin, age, and

retaliation for participating in EEO activity. To establish *a prima facie* case of discrimination under Title VII or the ADEA, Plaintiffs must show that they: (1) are members of a protected class; (2) suffered an adverse employment action; (3) were at the time performing their job duties at a level that met their employer's legitimate expectations; and (4) the position remained open or was filled by a similarly qualified applicant outside the protected class. *See, e.g.* , *Miles v. Dell, Inc.* , 429 F.3d 480, 485 (4th Cir. 2005) (Title VII); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004) (age). In the context of a failure to promote claim, Plaintiffs must show that they: (1) are members of a protected class; (2) applied for the position(s) in question; (3) were qualified for each position; and (4) were rejected for each position under circumstances giving rise to an inference of unlawful discrimination. *Anderson v. Westinghouse Savannah River Co.* , 406 F.3d 248, 268 (4th Cir. 2005). Finally, to prove *a prima facie* ease of retaliation, Plaintiffs must demonstrate that (I) they engaged in protected activity, (2) a reasonable employee would have found the challenged action materially adverse, and (3) there was a causal connection between the activity and the challenged action. *See Burlington N & 8 F. R. Co. v. White*, 548 U.S. , No. *05-259*, slip op. at 13 (2006); *Price v. Thompson*, 380 F.3d 209, 212 (4th Cir. 2004).

### D. Plaintiffs' Retaliation Claims.

This Court's analysis of Plaintiffs' retaliation claims must take into account the Supreme Court's recent decision in *Burlington N & S. F. R. Co. v. White,* 548 U.S. , No. 05-259, slip op. (2006). In *Burlington v. White,* the Supreme Court held that a retaliation claim may proceed if the plaintiff can show "that a

reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 13 (citations and internal quotation marks omitted). In making this determination, the Supreme Court rejected the Fourth Circuit's prior holding that *a prima facie* case of retaliation under Title VII requires showing that the challenged employment action "result[s] in an adverse effect on the 'terms, conditions, or benefits' of employment." *Id.* at S (quoting *Von Gunten v. Maryland,* 243 F.3d *858, 866* (4th Cir. 2001)).

The *Burlington v. White* decision significantly impacts this case. Most of the employment actions at issue in this case are challenged on the basis that they constitute retaliation for Plaintiffs ' participation in protected activity. In addition, *Burlington v. White* was issued *after* the briefing in this matter was complete. As a result, Plaintiffs' retaliation claims are understandably not analyzed in terms of whether a reasonable employee would have found the challenged action materially adverse. Finally, the Supreme Court emphasized that "the significance of any given act of retaliation will often depend upon the particular circumstances" and that, as a result, "[c]ontext matters." *Id.* at 14.

For obvious reasons, this Court has no basis for assessing whether Plaintiffs have stated a *prima facie* case of retaliation with respect to the challenged employment actions. After considering the underlying record, this Court also concludes that Plaintiffs ' retaliation claims are not susceptible to summary judgment prior to the conduct of discovery. This ease will therefore proceed with respect to Plaintiffs'

retaliation claims, which challenge the following employment actions:

( a) At various times, A. Stoyanov was denied directly funded work, excluded from managing projects, or not assigned positions of higher responsibility. *(See* A. Compl. 11 55-57, 61, & 65-66.)

(b) On February 21 , 2002, A. Stoyanov's work schedule was changed. *(See* A. Compl. ¶ *59.)*

(c) At various times, A. Stoyanov was not promoted to positions of higher responsibility. *(See* A. Compl. ¶~J 50 & 81-81.5.)

(d) In April and September 2002, A. Stoyanov was assigned minor tasks. *(See* A. Compl. ¶~J 84.7 & 84.11.)

(e) On May 1 7, 2002, A. Stoyanov's work and funding allocation was changed. *(See* A. Compl. ¶ 84.8.)

(f) In May 2002, A. Stoyanov's travel request to the IEEE symposium was denied. *(See* A. Compl. ¶ 82.)

(g) On July 29, 2002, A. Stoyanov was asked to submit daily work summaries. *(See* A. Compl. ¶ 84.9.)

(h) In September 2002, A. Stoyanov was threatened with discipline. *(See* A. Compl. ¶ 84.10.)

(i) In 2002, a new computer was not purchased for A. Stoyanov as promised.[18]

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[18] Although not specifically addressed in A. Stoyanov's Complaint, both parties discuss A. Stoyanov's allegation that he was retaliated against when his supervisor failed to purchase a new computer for him. *(See* A. Stoyanov's Opp. pp. 47-48; Defs' Reply (05-1567) pp. 15-16.) It is not clear from A. Stoyanov's papers whether A. Stoyanov seeks to challenge the

(j) In September-December 2001, Y. Stoyanov's work assignment was changed. *(See Y.* Compl. ¶ *84.5.)*

(k) At various times, *Y.* Stoyanov's work was interfered with by his supervisors. *(See* Y. Compl. ¶~ 50-53.)

(l) At various times, *Y.* Stoyanov was denied directly funded work, excluded from managing projects, or not assigned positions of higher responsibility. *(See* Y. Compl. ¶ 53, 55-57, 67-69, 84, 84.3, 84.6, 84.9, & 84.24-84.25.)

(m) On February 21, 2002, *Y.* Stoyanov's work schedule was changed. *(See* Y. Compl. ¶ 60 & 84.7.)

(n) The hiring of Mr. M. Mirotznik. Also, the provision to Mr. Mirotznik of work, direct funding, and an exception to the "core hours' rule. *(See* Y. Compl. ¶ 84.13-16.)

(o) In 2002, Y. Stoyanov was transferred from the RE Technology Branch to the Structural Acoustics and Target Strength Branch, funds were redirected from Y. Stoyanov to his brother, and Y. Stoyanov was allegedly denied funding documents. *(See Y.* Compl. ¶ 6, 82-83, 84.8, 84.10-84.12, & 84.18.)

Accordingly, Defendants' Motions to Dismiss are

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remedy ordered by the EEOC-OFO with respect this claim. *Cf. Laber v. Harvey,* 438 F.3d 404, 423~24 (4th Cir. 2006) (holding that "Title VII does not authorize a federal-sector employee to bring a civil action alleging only that the [EEOC-OFO's] remedy was insufficient. Rather, in order properly to claim entitlement to a more favorable remedial award, the employee must place the employing agency's discrimination at issue.").

DENIED without prejudice with respect to Plaintiffs' retaliation claims under Title VII that challenge the employment actions described above. The above employment actions are challenged by Plaintiffs on substantive grounds of discrimination based on national origin and age, as well as retaliation. Defendants' Motions to Dismiss are DENIED with respect to all three contentions as they relate to the above employment actions. Furthermore, with respect to these employment actions, this Court will not review matters outside of the pleadings at this stage in order to consider summary judgment.
Accordingly, Defendants' alternative Motions for Summary Judgment are DENIED without prejudice.

### E. Plaintiffs' Claims Based Solely on National Origin and Age Discrimination.

There are two particular employment actions as to which Plaintiffs claim discrimination based solely on national origin and age. These actions are the following:

(1) At various times, Plaintiffs were excluded from classified information and programs. *(See* A. Compl. ¶ 34 & 67; Y. Compl. ¶ 33 & 69.)

(2) On February 4, 2002, Plaintiffs were not promoted to the position of branch head ofRF technology branch. *(See* A. Compl. ¶ 58 & 81 .2; Y. Comp. ¶ 59 & 84.1.)

With respect to these claims, this Court is inclined to treat Defendants' motions as ones for summary judgment as these claims merit analysis at this stage. Although discovery has not commenced in this matter, both parties rely extensively on the record created in the underlying administrative proceeding. In addition,

Plaintiffs do not appear to have filed an affidavit under Fed. R. Civ. P. *56(f)* or suggested that discovery is needed to address their discrimination claims. *See* FED. R. Civ. P. 12(b)(6) (Where "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule *56* . . . )[19]

**(1) At various times, Plaintiffs were Excluded from Classified Information and Programs.**

Plaintiffs allege that they was discriminated against on the basis of national origin and age when the Navy excluded Plaintiffs from the "largest programs in the department 74 such as Guilder Billy Goat, Guilder Babirussa and special access programs." (A. Compl. ¶ 34; Y. Compl. ¶ 33.) As noted above, to establish *aprimafacie* case of discrimination under Title VII or the ADEA, Plaintiffs must show that they: (1) are members of a protected class; (2) suffered an adverse employment action; (3) was at the time

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[19] This Court acknowledges the general principle that "summary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Harrods Ltd. v. Sixty Internet Domain Names,* 302 F.3d 214, 244 (4th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.* , 477 U.S. 242, 250 n.5 (1 986)). The nonmoving party, however, "cannot complain that summary judgment was granted without discovery unless that party had made an attempt to oppose the motion on the grounds that more time was needed for discovery." *Evans v. Techs. Apps. & Service Co.,* 80 F.3d *954,* 961 (4th Cir. 1996). "If a party believes that more discovery is necessary for it to demonstrate a genuine issue of material fact, the proper course is to file a Rule *56(f)* affidavit stating 'that it could not properly oppose a motion for summary judgment without a chance to conduct discovery." *HarrodsLtd.,* 302 F.3d at 244 (quoting Evans, 80 F.3d at 961).

performing their job duties at a level that met their employer's legitimate expectations; and (4) the position remained open or was filled by a similarly qualified applicant outside the protected class. *Miles v. Dell,* 429 F.3d at 485; *Hill* v. *Lockheed Martin,* 354 F.3d at 285. With respect to these claims, this Court concludes that Plaintiffs have established *a prima facie* case of discrimination. *Cf. Ross v. Communications Satellite Corp.,* 759 F.2d 355, 357 (4th Cir. 1985) (treating reduced job "responsibilities and professional status" as potential adverse employment actions).

Defendants articulate the following legitimate, non-discriminatory reason for Plaintiffs' exclusion from the classified and special access programs: "Access to any information concerning these programs, including funding, requires a Special Clearance Adjudication and Access which Stoyanov did not possess." (Defs' Mem. *(05-1567)* pp. 25-26; Defs' Mem. *(05-*161 1) p. 23.) Plaintiffs challenge this reason by relying on their own deposition testimony, hearing testimony, pleadings, and interpretations of documents to argue that Defendants lied, perjured, and contradicted themselves with respect to the classified status of the information and programs at issue. *(See* A. Stoyanov's Opp. pp. 19-20 & 29-34; Y. Stoyanov's Opp. pp. 28-29.) Such self-serving assertions, however, are insufficient to establish that a proffered legitimate, non-discriminatory reason is pretext for discrimination. *See Burns v. AAF-McQuay, Inc., 96* F.3d 728, 732 (4th Cir. 1996) (in evaluating whether plaintiff has adduced a sufficient quantity of proof, the court may consider the relative strength of the employer's asserted nondiscriminatory reasons); *Evans v. Tech. App. & Serv. Co.* , 80 F.3d 954, 960 (4th

Cir. 1 996) (unsubstantiated allegations and bald assertions will not carry the day for employee); *Goldberg* v. *B. Green & Co., Inc.* , 836 F.2d 845, 848 (4th Cir. 1988) (naked opinions and conclusory allegations insufficient to withstand summary judgment).

In sum, this Court concludes that Plaintiffs have failed to demonstrate that the legitimate, non-discriminatory reason proffered by the Navy is pretext for discrimination. Accordingly, Plaintiffs' allegation of exclusion from classified information and programs fails under the *McDonnell Douglas* burden-shifting framework.[20]

**(2) On February 4, 2002, Plaintiffs were Not Promoted to the Position of Branch Head of RF Technology Branch.**

Plaintiffs allege that they were discriminated against on the basis of national origin and age when the Navy promoted Stephen M. Farley ("Farley") instead of Plaintiffs to the position of Branch Head ofthe RF Technology Branch on February 4, 2002. *(See*

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[20] Assuming *arguendo* that Plaintiffs' claims satisfy the *McDonnell Douglas* framework, they would fail because this Court lacks subject matter jurisdiction to review a decision to deny a security clearance. *See Becerra v. Dalton,* 94 F.3d 145, 148 (4th Cir. 1996) ("Security clearances are within the Executive's purview, and therefore, 'unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs. ' ") *(quoting Department of the Navy v. Egan,* 484 U.S. 518, 530 (1988)).

A. Compl. ¶ 58 & 81.2; Y. Comp. ¶~J 59 & 84. 1 .) To establish *a prima facie* case of discrimination for failure to promote, Plaintiffs must show that they: (1) are members of a protected class; (2) applied for the position(s) in question; (3) were qualified for each position; and (4) were rejected for each position under circumstances giving rise to an inference of unlawful discrimination. *Anderson v. Westinghouse,* 406 F.3d at 268. After considering the papers submitted by the parties, this Court concludes that Plaintiffs have failed to establish the fourth prong *of the prima facie* test, *i.e.* , that Plaintiffs were rejected for the position under circumstances giving rise to an inference of unlawful discrimination. The Navy describes the selection process that was used to fill the position as follows:

> Each applicant for the position was interviewed and rated by a panel of six people, five of whom were experts whose combined backgrounds spanned the work of the Branch, and one EEO representative. [A. Stoyanov] was rated the second lowest by the panel members. King, the selecting official, selected the top three scoring applicants to re-interview with him. Stoyanov was not one of those who re-interviewed. From the re-interview of these three applicants, King selected Farley as his choice for the Branch Head position.

(Defs' Mem. (05- 1 567) p. 26 (citations omitted); *see also* Defs' Mem. (05-1 61 1) p. 24 (noting that Y. Stoyanov was rated the lowest by the panel members) (citations omitted).) Although Plaintiffs take issue with minor aspects of the job selection process, Plaintiffs fail to challenge to the description of the process presented by Defendants on meaningful grounds. *(See* A. Stoyanov's Opp. pp. 14-21; Y.

Stoyanov's Opp. pp. 14-20.)

Assuming *arguendo* that Plaintiffs could establish *a prima facie* case of discrimination, their claims would still fail because Plaintiffs have failed to establish that the legitimate, non-discriminatory reason articulated by Defendants is pretext for discrimination. Defendants proffer the following legitimate, non-discriminatory reason for the promotion of Farley instead of Plaintiffs: "[James H. King ("King")], the selecting official, selected Farley because Farley had the best 'vision' for the Branch and was the most qualified." (Defs' Mem. (05-1567) p. 27; Defs' Mem. (05-1611) p. 25 .) Plaintiffs challenge the articulated reason by arguing that they were the "best-qualified candidate" for the position and that their supervisors lied and committed perjury when describing aspects of the selection process. *(See* A. Stoyanov's Opp. pp. 14-21; Y. Stoyanov's Opp. pp. 14-20.) To support these claims, Plaintiffs rely on their own deposition testimony, hearing testimony, pleadings, and interpretations of documents. As already noted, however, such self-serving assertions are insufficient to establish that a proffered legitimate, non-discriminatory reason is pretext for discrimination. *See Burns,* 96 F.3d at 732; *Evans,* 80 F.3d at 960; *Goldberg,* 836 F.2d at 848. Plaintiffs also rely on the deposition testimony of various individuals, including King and Fancy. The specific deposition testimony cited by Plaintiffs, however, does not support any reasonable inference that the Navy's proffered legitimate, non-discriminatory reason is pretext.

In sum, this Court concludes that Plaintiffs have failed to establish *a prima facie* case of discrimination, and has also failed to demonstrate that

the legitimate, non-discriminatory reason proffered by the Navy is pretext. Accordingly, Plaintiffs' allegations that they were discriminated against on the basis of national origin and age when the Navy promoted Farley instead of Plaintiffs to the position of Branch Head of the RF Technology Branch on February 4, 2002 fails under the *McDonnell Douglas* burden-shifting framework.[21]

## VI. Motions to Strike.

Defendants move to strike A. Stoyanov's Rebuttal to Defendants' Reply, filed on January 5, 2006, and Y. Stoyanov's Rebuttal to Defendants' Reply, also filed on January 5, 2006, as unauthorized sur-replies. This Court finds that the pleadings at issue are sur-replies. Sur-reply memoranda are not permitted under the Local Rules unless otherwise ordered by the Court. *See* Local Rule 105.2(a) (0. Md. 2004). In this ease, leave to file a sur-reply memoranda was neither requested by Plaintiffs nor ordered by this Court. Accordingly, Defendants' Motions to Strike are GRANTED.

## CONCLUSION

For the reasons stated above, Defendants' Motions to Dismiss or, in the Alternative, for Summary Judgment are GRANTED-N-PART and DENIED-IN-PART, and Defendant's Motions to Strike are GRANTED. As a result, this ease will proceed with

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[21] Although Plaintiffs do not address whether the discrimination claims addressed in this section can be proved by applying the mixed-motive framework, this Court finds that Plaintiffs have not presented sufficient evidence, direct or circumstantial, "for a reasonable jury [...] *also EEOC* v. *Warfield-Rohr Casket Go.* , 364 F.3d 1 60, 1 63 (4th Cir. 20d4) (recognizing that ADEA claim may be proved under mixed-motive framework).

respect to a subset of Plaintiffs discrimination claims based on national origin, age, and retaliation. Separate Orders will follow with respect to these two civil actions.

Dated: July 25, 2006

*/s/*
Richard D. Bennett
United States District Judge

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**UNITED STATES COURT OF APPEALS**

**FOR THE FOURTH CIRCUIT**

**RE: 07 - 1969 Stoyanov v. Winter**

1:05-cv-01567-RDB

1:05-cv-01611-RDB

**INFORMAL BRIEF**

1. **Jurisdiction (for appellants only)**

   A. What is the name of the court from which you are appealing?

   The United States District Court for the District of Maryland.

   B. What is the date(s) of the order or orders you are appealing?

   August 15, 2007, Order and Judgment; July 25, 2006 Order and Judgment

2. **Timeliness of appeal (for prisoners only)**

   **When did you give your** notice of appeal to a prison officer for mailing to the United States District Court? Enter the exact date:

3. **Issues on Appeal**

Use the following spaces to tell the United States Court of Appeals for the Fourth Circuit why the judgment under review should be affirmed, reversed, or vacated and remanded. Appellants must provide a brief summary of the facts and arguments that support their position that the judgment under review was wrong. Appellees may rely on the facts and law stated in that judgment or may advance alternative grounds for affirmance or dismissal. The parties may cite case law, but it is not required.

**Issue 1. Direct evidence of age discrimination and hostile attitude toward Plaintiffs because of Plaintiffs' age.**

Judge Bennett abused discretion and made clearly erroneous finding of the material facts and law by denying jury trial and concluding that Plaintiffs have not presented any direct evidence of discriminatory conduct and hostile attitude toward Plaintiffs because of Plaintiffs' age.

**Supporting Facts and Argument.**

1. Facts and direct evidence of Defendant's intentions, hostile attitude, and discriminatory conduct toward Plaintiffs was identified in Plaintiffs' Affidavits. See Plaintiffs' Exhibit 1 in the 11/14/05 Plaintiff's Opposition to Defendants' Memorandum of Motion to Dismiss or Summary Judgment, Paper # 27.

2. During staff meetings and in the email of March 2000 the responsible management official Mr. King connected with the decision making process pressed on with his policy of age discrimination to hire and promote significantly younger individuals than his own age and Plaintiffs' age. See Plaintiffs' Exhibit ("Ps' Ex.") 1 at ¶ 15. (Paper #27)

3. In March 2000, Mr. King [Born in U.S., DOB 08/12/1953]sent email and expressed distress because he was above the average age of 44 - implying that the 44-years old Plaintiff [Born in Russia, DOB 4/7/55] was too old for the branch head position and subsequently Mr. King assigned the 29-years-old Mr. Farley [Born in U.S., DOB 5/16/69] to the acting branch head position in April 2000. See Report of Investigation 02-00167-003 ("ROI-03") p. 414a- 414b, ROI-02-00167-002 p. 483- 484 (Defendants' Exhibit ("Ds' Ex.") 1, Paper #23).

4. As the second level supervisor Mr. King intentionally discriminated against 45-years old Plaintiffs Dr. Aleksandr Stoyanov and Dr. Yuri Stoyanov, the only two Russian-born employees in the department 74, denying promotion, positions of leadership and excluding Plaintiffs from managing programs of any significance. Around 1995, Mr. King denied Plaintiff Dr. Yuri Stoyanov management of a special access project. See Ps' Ex. 1 at ¶ 17, Paper # 27.

5. In or around 1997, Mr. King intentionally denied Plaintiff Dr. Aleksandr Stoyanov leadership position in a million dollar project Komodo, but assigned unqualified significantly younger employee (Mr. Dirlick [American, DOB 1/8/63]). Only when it became apparent that project Komodo was going to fail due to Mr. Dirlick's lack of qualifications, Mr. King assigned the Plaintiff to lead the project. See Ps' Ex. 1 at ¶ 21-22.

6. Mr. King deliberately denied positions of responsibility, projects of any significance and promotions to Plaintiffs when in or around 1998, significantly younger (by more than 14 years) Ms. Dela Cruse [American, DON 12/2/69] with no experience,

knowledge, or ability was appointed as the task leader of the LMS advanced technology demonstration project while Plaintiff was assigned only a small task subordinate to Ms. Dela Cruse in the LMS project. See Ps' Ex. 1 at ¶ 23.

7. In September 1998, Mr. King denied Plaintiff 6.2 program manager position, but appointed the least qualified significantly younger (by more than 6 years) Mr. S. Russell [U.S., DOB 11/11/61] with inferior qualifications who had not worked in the Ship Electromagnetic Signature Technology prior to his appointment, while Plaintiffs Dr. Yuri Stoyanov and Dr. Aleksandr Stoyanov were the best qualified with experience in Electromagnetic Technology since 1986. See Ps' Ex. 1 at ¶ 18-19.

8. Plaintiff Dr. Aleksandr Stoyanov opposed intentional discrimination and informed first-level supervisor Mr. John Davies (U.S., DOB: 09/07/1946) about discrimination against Plaintiff because of denied assignments to career ladder positions. See Deposition of A. Stoyanov ("ASD") p. 61. Mr. Davies admitted that there was discrimination.

9. Mr. King continued to discriminate against both Plaintiffs by intentionally denying promotions to both Plaintiffs and hiding promotions of other employees with inferior qualifications promoted by fraud and secretly. See ASD p. 61-62.

10. In 1999, Mr. King was selecting official for the branch head position in the Infrared Technology Branch Code 742 and intentionally discriminated against Plaintiff Dr. Aleksandr Stoyanov denying him selection to the Branch Head position and instead selecting incompetent significantly younger Mr. D. Vinh-Nguyen ("Vinh") [DOB 3/28/60] more than 9

month after the selection process announcement. See Deposition of J. King (JKD) p. 215-218, Ds'. Ex. 1 at ¶ 29, 58, Ds'. Ex. 2 at ¶ 31, 61; in Paper # 94

11. In April 2000, Mr. King assigned to the acting branch head position of RF Technology branch Code 741 the least qualified, incompetent 29-year-old junior engineer Mr. S. Farley [Born in U.S., DOB 5/16/69] because he was 14 years younger than 45-year-old Plaintiffs. See Plaintiffs' Exhibit #14 in Paper # 94, Ds'. Ex. 1 at ¶ 25, 31, Ds'. Ex. 2 at ¶ 27, 33

12. In 2000 and 2001, Mr. King continuously escalated discrimination against Plaintiffs by denying assignments and promotions, but retaliated for opposing discrimination using his subordinates in positions of authority. ROI-03 p.134-137, 171-185, 188.

Mr. King admitted that he assigned Farley to be acting Branch Head since April 2000, until the February 4, 2002 announcement that Farley was selected as permanent Branch Head. See Ps' Ex. 14. Mr. King violated rules governing temporary promotions of more than 120 days by assigning Farley to the acting branch head position for additional more than 500 days. Ps' Ex. 10 in Paper # 94, ROI-03 p. 393 (B)(1), 394(e).

13. Farley never worked in the RF Technology branch prior to April 2000 and did not possess knowledge nor experience in the RF Technology related to the research and development of 6.1 and 6.2 type of work performed in the branch. See e.g., Ds' Ex. 14, S. Farley Deposition ("SFD") p. 33; Ds' Ex. 12, JKD p. 203-204; Ps' Ex. 15, ROI-03 p. 142-193. Farley admitted that he did not do 6.1 and 6.2 work, which was mostly research and development work done at RF Technology branch Code 741, and had no

publications in technical journals. Ps' Ex. 15, SFD2 p. 34.

14. The direct evidence of age discrimination against 45 years old Plaintiffs was established considering assignment of the 29 years old incompetent Farley one month after the March 2000 email about "real paucity of employees in the 26 to 36 year age bracket," distress for being above the average age of 44, and "need for fresh ideas and enthusiastic energy of new employees." See Plaintiffs' Exhibit 1 at ¶ 31; ROI-03 p. 414a- 414b

15. In October 2001, Mark Mirotznick (American; DOB: 9/4/1965) was hired with the same or higher salary than Plaintiffs' salary, however significantly younger (more than 10 years) Mirotznick had far inferior experience and qualifications than Plaintiffs qualifications and experience. Ps' Ex. 27, ROI-02 p. 164-165.

16. In or around January/March 2001, Jerry Smith Jr. (American; DOB: 1/22/1973) was hired with significantly inferior experience and qualifications than Plaintiffs qualifications. Mirotznick and Smith were hired to replace Plaintiffs. Ps' Ex. 27, ROI-02 p. 157, 159.

17. Mr. King was hiding a series of fraudulent and secret promotions of younger American-born employees with inferior qualifications than Plaintiffs' qualifications under the "accretion of duties" to cover up continuous intentional discrimination against Plaintiffs; See Ps' Ex. 46 (High Grade Promotions Code 70) Paper #94.

18. Mr. King assigned to career ladder positions and subsequently fraudulently and secretly promoted

following individuals (S. Russell, D. Vinh, G. Miller, W. Stephens, K. Wilson, D. Mayo, W. Nichols, R. Renfro) to intentionally escalate discrimination against Plaintiffs because of Plaintiffs' age and national origin. ROI-03 p. 12-14, 134-137. ROI-02 p. 16-21.

19. Mr. King violated regulations specifically requiring that "The potential for future promotion must be made known to all potential applicants" while fraudulent promotions under the "accretion of duties" were made secretly and unknown to Plaintiffs or other potential applicants. See Ps' Ex. 10, ROI-03 p. 394 (e), Plaintiffs' Exhibit 1 at ¶ 28-30, 20.

The facts identified above established direct evidence in the record of the pattern and practice of age discrimination against Plaintiffs when significantly (some more than 14 years) younger individuals with inferior qualifications than Plaintiffs' qualifications were assigned and promoted to higher responsibility positions. Judge Bennett abused discretion and made clearly erroneous decision unsupported by substantial evidence in the 7/25/06 Memorandum of Opinion stating on page 21, that the comments in the selecting official's email about "real paucity of employees in the 26 to 36 year age bracket," distress for being above the average age of 44, and "need for fresh ideas and enthusiastic energy of new employees" did not constitute direct evidence of discriminatory and hostile attitude based on age, contrary to the strong evidence of discrimination against Plaintiffs and direct evidence of discriminatory intent made by the responsible management official connected with the decision making process of denying Plaintiffs assignments and promotion to a higher responsibility positions because of Plaintiffs' age.

Plaintiffs provided (see also Issue 6 below) with specificity direct evidence of a pattern of age discrimination against Plaintiffs in promotions of younger employees with inferior qualifications than Plaintiffs' qualifications when specific employment practices of discrimination and the pattern of fraudulent promotions under the "accretion of duty" and by hiding vacancy announcements were isolated, identified, and combined with evidence of disparate treatment and intentional discrimination against Plaintiff because of age. Plaintiffs created a jury question by providing direct evidence of Mr. King's discriminatory intent and hostile attitude toward Plaintiffs based on age combined with the strong evidence of disparate treatment of both Plaintiffs compared to the treatment of other younger American-born employees and the pattern of a series of fraudulent and secret promotions of significantly younger employees with inferior qualifications than Plaintiffs qualifications; however Judge Bennett made clearly erroneous interpretation of material facts and law because "direct evidence would be what [the employer] said or did in the specific employment decision in question." See *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997).

In fact, Judge Bennett abused discretion and misrepresented facts in 7/25/06 Memorandum of Opinion on page 21: "[f]irst, this email was sent well before Plaintiff first sought EEO counseling on February 4, 2002," contrary to the facts that the email was sent within a month of assigning significantly (by more than 14 years) younger incompetent Mr. Farley than Plaintiffs to the acting Branch Head position while denying the position to Plaintiffs. Furthermore, admissibility of age-biased comments by decision-

maker made five years before denial of tenure was upheld in *Roebuck v. Drexel Univ.*, 852 F.2d 715, 733 (3d Cir. 1988), *Stewart v. Rutgers, State Univ.*, 120F.3d 426, 433 (3d Cir. 1997). In addition, an individual plaintiff may "use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination within the McDonnell Douglas framework." *Lowery v. Circuit City Stores, Inc.*, 158 F. 3d at 760-61 (4th Cir. 1998). And "[A] discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990).

The evidence of disparate treatment of both Plaintiffs compared to the treatment of other younger American-born employees and the pattern of age bias clearly supported claims of intentional discrimination on bases of Plaintiffs' age. The direct evidence of age discrimination against 45 years old Plaintiffs and cumulative effect of disparate treatment revealed a pattern and practice of age antagonism, which overcame any doubts raised by the temporal separation of events. The pattern of age discrimination, the discriminatory comments, and the pattern of antagonism combined with the direct evidence of numerous promotions of significantly younger employees with far inferior qualifications than Plaintiffs' qualifications are highly relevant to the existence of improper motive and intent clearly probative of whether selecting official harbored the discriminatory attitude towards Plaintiffs. Direct evidence is a "distinct" type of evidence that uniquely reveals "intent to discriminate[, which] is a mental state" when Defendants engaged in prohibited discrimination against Plaintiffs. *Troupe v. May Dep't*

*Stores*, 20 F.3d 734, 736 (7th Cir. 1994). Direct evidence "can be interpreted as an acknowledgment of discriminatory intent by the defendant or its agents." *Id.* The ADEA provides a right to jury trial for all claims covered by the Act including disparate impact claims. The Supreme Court held that ADEA authorizes recovery on disparate impact claims, comparable to the claim established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which announced a disparate impact theory of recovery under Title VII cases. See *Smith v. City of Jackson*, 544 U.S. 228 (2005).

The U.S. Supreme Court made it easier for public or private-sector employees to win age discrimination suits holding that the fact of advanced age alone -- in the absence of any other justification for an adverse action -- is sufficient. See *Reeves v. Sanderson Plumbing Products, Inc, 530 U. S. 133, 140 (2000).* The Supreme Court had occasion to consider what showing a plaintiff had to make regarding pretext and, specifically, whether a plaintiff could satisfy his or her burden by merely rebutting the defendant's explanation for the action. Making credibility determinations and weighing any evidence along with the drawing of legitimate inferences from the facts, are for the jury, not the court. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment with regard to direct evidence of discriminatory conduct and hostile attitude toward Plaintiffs because of Plaintiffs' age.

**Issue 2. Direct evidence of discrimination on bases of national origin.**

Judge Bennett abused discretion and made clearly erroneous finding of the material facts and law, in the 7/25/06 Memorandum Opinion by denying jury trial and stating on page 21: "Plaintiffs have not presented any direct evidence of discrimination based on ... national origin" contrary to the undisputed direct evidence that Defendants excluded Plaintiffs from department largest programs Billy Goat and the special access programs because of national origin.

**Supporting Facts and Argument.**

Facts and direct evidence of Defendant's hostile attitude, and continuous discriminatory conduct toward Plaintiffs because of national origin was identified in Plaintiffs' Affidavits. See Plaintiffs' Exhibit 1 in the 11/14/05 Plaintiff's Opposition to Defendants' Memorandum of Motion to Dismiss or Summary Judgment, Paper # 27.

1. Mr. King excluded both Plaintiffs from participation in the largest programs in the department 74 such as Billy Goat and special access programs in spite of the fact that Plaintiffs were the best qualified to work on these projects, were holding Top Secret security clearances since about 1990, and Plaintiffs were eligible to be "signed in" to work on special access programs. See Plaintiffs' Exhibit 1 at ¶ 17; ROI-03 p. 135.

2. Around 1995, Plaintiff Dr. Yuri Stoyanov asked Mr. King to manage a special access project, however Mr. King denied the position. See Ps' Ex. 1 at ¶ 17, ROI-02 p. 160.

3. Mr. King was biased and prejudiced toward any one or anything having any relationship with Russia. Around 1995, Mr. King denied Plaintiff Dr.

Aleksandr Stoyanov purchase of the Toshiba brand computer stating that Toshiba should be punished for selling its technology to Russia, (former Soviet Union). See ROI-03 p. 131, 191; Ps' Ex. 1 at ¶ 17. As a result of Mr. King's bias against Russian born Plaintiffs, Mr. King intentionally discriminated and excluded Plaintiffs from participation in the largest programs in the department 74 such as Billy Goat and special access programs. Deposition of A. Stoyanov ("ASD") p. 280-287.

4. Mr. King intentionally discriminated against Plaintiffs and denied career ladder opportunities by assigning significantly younger American-born employees to career ladder management positions to deny Plaintiffs promotions and opportunity to reach true potential at the agency. See ROI-03 p. 151, Ps' Ex.1 at ¶ 39; facts presented with regard to age discrimination against Plaintiffs are also applicable to the evidence of intentional discrimination against Plaintiffs because of national origin, specifically ¶¶ 9 –11, 15-17 above.

5. Mr. King lied that it was not his decision to deny Plaintiffs assignment of work on special access programs. During the EEOC hearing, Mr. Chatterton testified that recommendation to work on the special access projects was controlled by the individual's command, contrary to fraudulent assertions made by Mr. King. See Ps' Ex. 3, Hearing Transcript 5/20/04 p. 20-21.

6. Plaintiffs also presented evidence during the administrative EEOC process specifically filing motion on 3/5/03 and exposing agency representative Mr. Caron's conspiracy to commit perjuries to cover-up blatant discrimination against Plaintiffs, the only

two Russian-born employees in the department, for denied work and funding from "Billy Goat" programs and special access programs. The 3/5/03 motion clearly established that Mr. Caron conspired with Mr. King to commit perjuries. See Ps' Ex. 9 at ¶ 7-11, in the 11/14/05 Plaintiff's Opposition to Defendants' Memorandum of Motion to Dismiss or Summary Judgment, Paper # 27.

Judge Bennett abused discretion and made clearly erroneous conclusions in the 7/25/06 Memorandum Opinion on page 29 "that Plaintiffs have failed to demonstrate that the legitimate, non-discriminatory reason proffered by the Navy is pretext for discrimination" contrary to the facts presented by Plaintiffs clearly establishing that the responsible management official Mr. King connected with the decision making process lied and committed perjury with regard to assignments to the special access programs. Judge Bennett acknowledged in the 7/25/06 Memorandum Opinion on page 28 that Plaintiffs have established a prima facie case of discrimination with respect to the national origin and: "Plaintiffs challenge [Defendants pretext] by relying on their own deposition testimony, hearing testimony, pleadings, and interpretation of documents to argue that Defendants lied, perjured, and contradicted themselves ...;" however, Judge Bennett clearly abused discretion by weighing evidence and making credibility determinations of the facts presented by Defendants and Plaintiffs instead of a jury to consider the facts.

Plaintiffs made out a strong prima facie case of national origin discrimination and offered ample evidence to discredit Defendants proffered reason for its failure to assign and promote Plaintiffs to positions

of higher responsibility including the special access programs. Compare *EEOC v. Sears Roebuck & Co.* 243 F.3d 846 (4th Cir. 2001), where the Court reversed a grant of summary judgment in favor of the employer after applying the *Reeves* formulation. Under *Reeves,* Plaintiff is entitled to survive summary judgment; a prima facie case coupled with probative evidence "that the employer's explanation is false," would counsel against granting the employer summary judgment." *Reeves*, 530 U.S. at 149. "[A]t summary judgment the plaintiff is not required to establish pretext *and* provide evidence of a discriminatory motive by the defendant . . . . This level of proof is only required when a plaintiff's case is submitted to a finder of fact." *Mills v. Health Care Serv. Corp.*, 171 F.3d 458 (7th Cir. 1999). Plaintiffs identified direct evidence of discrimination against Plaintiffs based on national origin and identified evidence to discredit Defendants' pretext for denied assignments and promotions to positions in special access programs. Plaintiffs showed in the March 5, 2003 motion (Plaintiffs' Exhibit 9 in the 11/14/05 Plaintiff's Opposition, Paper # 27) that Mr. King controlled assignments to the "Billy Goat" programs and special access programs, but lied and committed perjury that he did not deny Plaintiffs assignments to Billy Goat and special access programs. In fact, during the EEOC hearing the testimony of Mr. Chatterton, the agency witness managing special access programs, clearly contradicted Mr. King's declaration establishing that Mr. King committed perjuries and proffered pretext to cover up discrimination against Plaintiffs because of national origin. "Once the employee has cast doubt upon the employer's proffered reasons for the termination, the issue of whether the employer

discriminated against the plaintiff is to be determined by the jury—not the court." *Weisbrot v. Med. Coll. of Wisconsin*, 79 F.3d 677, 681-82 (7th Cir. 1996).

Moreover, Judge Bennett abused discretion and misrepresented facts in the 7/25/06 Memorandum Opinion in footnote 20 that the District "Court lacks subject matter jurisdiction to review a decision to deny a security clearance," contrary to the facts that Plaintiffs were not denied security clearance and instead Plaintiffs challenged Defendants with regard to assignments to the special access projects while Plaintiffs already had Top Secret security clearances (in fact, Judge Bennett misrepresented the issue as "review a decision to deny security clearance" contrary to the fact that Plaintiffs were never denied a security clearance) and clearly established that Defendants lied, contradicted and committed perjuries with regard to denied assignments to the special access projects because of intentional discrimination against Plaintiffs on bases of national origin.

The direct evidence showed that Defendant King continuously denied Plaintiffs, the only two Russian-born employees in the department, work and funding from "Billy Goat" programs and special access programs. The evidence of animus toward Plaintiffs because of the national origin coupled with the pattern of denied assignments, career ladder positions, and denied promotions constituted a clear evidence of intentional discrimination against Plaintiffs on bases of age and national origin and was sufficient to deny Defendants' request for summary judgment and to send this case to the jury. Plaintiffs also presented Mr. King's disparate treatment of both Plaintiffs because of age and national origin compared to the treatment of other younger American-born employees

including Farley, Russell, Nichols, Stephens, Vinh, Miller, Wilson, Renfro and others. Plaintiffs created jury questions of discrimination on bases of national origin because of the Plaintiffs' strong *prima facie* cases combined with the direct and circumstantial evidence that was capable of refuting Defendants' asserted reasons.

**Issue 3. Intentional Discrimination for Denied Promotion to Branch Head.**

Judge Bennett abused discretion and made clearly erroneous conclusion that "Plaintiffs have failed to establish the fourth prong of the *prima facie* test, *i. e.*, that Plaintiffs were rejected for the position under circumstances giving rise to an inference of unlawful discrimination" because "Plaintiffs fail to challenge the description of the process presented by Defendants on meaningful grounds" contrary to the facts that the position was filled by a significantly younger (more than 14 years) American-born white male [Farley] far less qualified than Plaintiffs, and the Plaintiffs identified in Plaintiff's Opposition on page 17 under §4 that "the resumes were not used in the selection process and 5 out of 6 panel members were Defendant King's current or former subordinates" establishing selecting official's machinations and fraud with the selection process.

**Supporting Facts and Argument.**

1. Facts and evidence of intentional discrimination against Plaintiffs were identified and presented by Plaintiffs in the Pretext Statement addressing management's testimony. See ROI-03 p. 142-193, ROI-02 p. 191-225.

2. Plaintiffs specifically challenged the selection process addressing the issue in the Plaintiffs' Opposition (Paper # 27) stating on page 17: "Defendant King conspired with Defendant Davies as selection panel chair and used his subordinates and former subordinate to discriminate against Plaintiffs and hide behind selection panel, ROI-03 p. 149-151, ROI-02 p. 192, ASD p. 202-205."

3. "[T]he fraud in setting up evaluation panel by Mr. King through Mr. Davies was well described by Mr. Moore, who in his testimony explained that the resumes were given to the panel, however, the panel members were forbidden to use resumes in scoring." See ROI-03 p. 149. Mr. Moore stated: "We were given their resumes/applications, however the rating was supposed to be based on their responses to the interview questions and I used only the interview to rate them." ROI –03 p. 264.

4. "The contrast in rating by Mr. King's subordinates and the only independent panel member is so blatant that discrimination is obvious to any reasonable mind. The 5 out of the 6 panel members knew that Defendant King wanted to promote Farley [14 years younger than Plaintiffs] after keeping Farley acting for 22 months, ROI-03 p.155-156, 286; ROI-02 p. 191-193." See Plaintiffs' Opposition (Paper # 27) on page 17, at ¶ 5.

5. "The conspiracy to manipulate selection process was used by Mr. King not only in administrative selection (...), but in technical projects as well." ROI-03 p. 155.

6. The only independent panel member Mr. Moore ranked Plaintiff and his brother much higher than

Farley; Farley was ranked the lowest, ROI-02, p.3, 181, 192-193, (Y. Stoyanov Deposition) YSD p. 146.

7. The ranking by Mr. Moore shows that Plaintiff Dr. Aleksandr Stoyanov was ranked far higher than Mr. Farley. ROI p. 308-309[1].

8. Mr. Moore stated that he gave selectee, Mr. Farley, the lowest rating because Mr. Farley appeared to be rambling and not communicating his views. Additionally Mr. Moore felt that Mr. Farley did not manage his time well and had to rush to answer some questions. See ROI-03, p. 42.

9. The contrast in ratings for A. Stoyanov and S. Farley by the only independent panel member and Mr. King's subordinates Davies, Morgan, Renfro, and Sekellick showed blatant bias. See ROI-03 p. 310. "Everyone on the panel, except Mr. Moore, knew that Mr. King wanted Mr. Farley to get the job. ... many people know Mr. King is very vindictive, so they rated the candidates in favor of Mr. Farley." ROI-03 p. 132. Fraud with selection and intentional discrimination were obvious: "The panel knew that Mr. Farley was Mr. King's favorite so they gave him higher scores than me and my brother." ROI-02 p. 156.

10. Plaintiffs had successfully performed work identified in the position requirements for more than 19 years and conducted specialized research in science and technology 6.1, 6.2 and 6.3 programs, while the selectee has not performed such work and

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[1] Plaintiffs were denied to see original rating sheets during discovery. Plaintiffs suspected that the error in the total rating of 104 instead of 112 for "Aleks Stoyanov" by Mr. Moore was not an accident, but the rating was intentionally changed.

had far limited knowledge and experience than Plaintiffs. Compare applications A. Stoyanov (ROI-03 p. 317-323) and Y. Stoyanov (ROI-02 p. 362-367) with the application of S. Farley (ROI-03 p. 314-416).

11. The vacancy announcement described the specialized experience in specific science oriented terms: experience with Radio Frequency (RF) and Radar Cross Section (RCS) theory and predictive techniques, and must have RF RCS measurements and data analysis. ROI-03 p. 280.

12. Farley did not do any research related to the theory and measurements in RF RCS (6.1 and applied 6.2 research) that is part of the specialized experience in the vacancy announcement. See Farley's Deposition, SFD p. 33-34.

13. The qualifications required for the Branch Head position in RF Technology Code 741 also included: Extensive experience in the management of complex technical programs; Experience with Radar Theory, Instrumentation systems, and RCS measurement, and data analysis; Knowledge and experience with RCS analysis and predictive techniques. See ROI-03 p. 284.

14. Farley did not have specialized and extensive experience required for the Branch Head position in RF Technology Code 741. See ROI-03 p. 314-316; ROI-02 p. 154-156, SFD p. 27, Warfield Depo. p. 52-53, P's Ex. 11; Wilson Depo. p.60, 67, P's Ex. 12

15. The vacancy announcement described the Branch Head position to provide leadership and supervision related to: Research in the full range of RF Technology issues as they influence ship signatures, Developing science, technology, and RCS

measurements to solve RF signature problems, Solving specific RCS problems requiring innovative solutions, Developing and evaluating analytical model computer codes to predict RCS; maintaining RCS development plan; Developing and maintaining RCS measurement systems needed to evaluate signatures of Navy assets, etc. See ROI-03 p. 279, ROI-02 p. 322.

16. Plaintiffs were the most qualified with over 12 years of experience in the RF Technology branch while selectee had no such experience and was placed in the branch in 2000. See applications Dr. A. Stoyanov (ROI-03 p. 48-53 or 317-323) and Dr. Y. Stoyanov (ROI-02 p. 83-87 or 362-367), and the application of Mr. S. Farley (ROI-03 p. 314-416).

17. Plaintiffs submitted supplemental material with the list of publications and patent disclosures reflecting Plaintiffs' specialized research and development experience while Farley did not have specialized experience. See ROI-03 pg. 52-53, ROI-02 p. 87.

18. The selecting official Mr. King lied describing biased selection process (JKD p. 199) because "results from the panel were" not "consistent with what was on the applications" and was based on intentional discrimination against Plaintiffs on the bases of age and national origin; ASD p. 44-46, 281-287; YSD p. 261-263.

19. Defendants contention that Farley was competent is based on Mr. King's lies and self-serving assertions contradicting facts as explained in the pretext statement ROI-03 p. 142-193, ASD p. 231-239, SFD p. 26-27, ROI-02 p. 180-225. King contradicted Farley. See JKD p. 205-209 v. SFD p.

26-27, P's Ex. 16, ASD p. 214, ALD p. 21. Mr. King conspired[2] with agency representative Mr. Caron to commit perjury and proffered self-serving lies, which had no bases in fact, ASD 231-239.

20. The subordinate selection panel members were aware of Mr. King's intentions to hire and promote younger employees; ROI-03 p. 152-153.

21. Farley was the youngest and least qualified applicant for the Branch Head position; See ROI-03 p. 286-287, 132. King intentionally discriminated against Plaintiffs. ROI-03 p. 131-132. ROI-02 p. 155-156.

The facts identified above and the Plaintiff's Opposition (Paper #27) establish that Judge Bennett abused discretion and made clearly erroneous finding of the material facts and law because Plaintiffs established a strong *prima facie* case of employment discrimination casting serious doubt on the Defendants' proffered justification for denied promotion to the Branch Head position in Code 741. Plaintiffs were the most qualified for the Branch Head position with over 12 years of relevant experience in the RF Technology branch 741 while Farley was in the branch only 22 months without required knowledge of the RF Technology, related experience, and far inferior

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[2] On 7/29/02, King wrote email informing his supervisor G. Jebsen that Caron suggested to "go one step higher," someone Plaintiffs "might feel confident was not out to get them." Jebsen responded: " I don't like the sound of mediation; implies we have some grounds for compromise" while King was willing to offer Plaintiffs his Department Head position well aware of Plaintiffs' qualifications; however Jebsen was intent to continue discrimination and unwilling to compromise. In fact, Jebsen conspired to escalate discrimination and retaliations against Plaintiff. See e.g., Issues 10 and 11 below; Ps' Ex. 39.

qualifications than Plaintiffs qualifications. Plaintiffs were denied the position in favor of significantly younger (more than 14 years than Plaintiffs) Farley outside the protected groups thus creating an inference of age and national origin discrimination. Farley did not have specialized experience and qualifications required in the vacancy announcement for the Branch Head position in RF Technology Code 741. Plaintiffs were the most qualified with over 12 years of experience in the RF Technology branch while Farley had no such experience and was placed in the branch in 2000. The Supreme Court has found that an employee's claimed superior qualifications for the position sought could show that the employer's articulated reasons were pretextual. See *Ash, et al. v. Tyson Foods, Inc.* Case No. 05-379, decided on February 21, 2006.

The potential to slant selection in favor or disfavor of a candidate was obvious when the selecting official's subordinates were used to manipulate selection and to hide behind the selection panel intentional discrimination against Plaintiffs. Everyone on the panel, except Mr. Moore, knew that Mr. King wanted younger Mr. Farley to get the job so they gave Farley higher scores than Plaintiffs. By manipulating the selection process Mr. King promoted the youngest applicant to the Branch Head position in spite of Farley's lack of qualifications. The contrast in ratings for A. Stoyanov and S. Farley by the only independent panel member and Mr. King's subordinates Davies, Morgan, Renfro, Warfield, and Sekellick showed blatant bias. Describing biased selection process to cover up machinations and fraud with the promotion, Mr. King lied that "results from the panel were consistent with what was on the applications" to cover

up manipulations and fraud with the selection of the youngest and incompetent Farley. The intent to manipulate selection and deny Plaintiffs promotion was also supported by the evidence of continuous pattern and practice of age and national origin discrimination against Plaintiffs when considerable number of significantly (some more than 14 years) younger individuals with inferior qualifications than Plaintiffs' qualifications were assigned and promoted to higher responsibility positions. See also list of fraudulent promotions under the "accretion of duties" promotions in Code 70. See Ps' Ex. 46 (High Grade Promotions Code 70). Mr. King's lies and self-serving assertions contradicted facts as explained in the Plaintiffs' pretext statement; ROI-03 p. 142-193, ROI-02 p. 180-225. King lied and used Farley's gofer experience at NAVSEA as a pretext unworthy of credence. King contradicted Farley with regard to Farley's experience. In fact, the vacancy announcement for the Branch Head in RF Technology branch did not call for a "gofer experience at NAVSEA," rather, the requirements for the position are described in more specific science oriented terms, such as research in the full range of RF Technology issues as they influence ship signatures, Solving specific RCS problems requiring innovative solutions, etc. Agency representative Mr. Caron conspired with Mr. King and others to commit perjuries and proffer self-serving lies, which had no bases in fact; ASD 231-239. The evidence established that defendants fabricated pretext unworthy of credence based on lies and perjuries of agency officials for the purposes of litigation.

Plaintiffs created jury questions of discrimination because "[t]he strength of the *prima*

*facie* evidence in creating an inference of discrimination, and 'the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt.'" *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 648 (4th Cir. 2002) (quoting *Reeves*, 530 U.S. at 147). Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment with regard to the claim of intentional discrimination against Plaintiffs for denied promotion to Branch Head.

**Issue 4. Discrimination By Denying Assignment To Acting Branch Head Position.**

Judge Bennett abused discretion and made clearly erroneous finding of the material facts and law in the 7/25/06 Memorandum Opinion by dismissing Plaintiffs' claims of denied position as acting Branch Head in the radio frequency technology branch. On August 15, 2007, Judge Bennett abused discretion and closed Plaintiffs consolidated action[3] without addressing the claim of denied position as acting Branch Head and denied Plaintiffs' Motion for Additional Findings on September 4, 2007.

**Supporting Facts and Argument.**

1. The evidence in the record established that Plaintiffs timely contacted the EEO counselor and specifically raised the issue of denied assignment to the acting branch head position because of

[3] Judge Bennett abused discretion and denied Plaintiffs Motion for Extension of Page Limit in the consolidated case and Plaintiffs had to submit Condensed Memorandum in Support of Opposition. See Paper 90 and 91.

continuous intentional discrimination against Plaintiffs. See ROI-03 pp. 37-38; ROI-02 pp. 47-49.

2. In March 2000, Mr. King expressed intent to hire and promote significantly younger employees because of "real paucity of employees in the 26 to 36 year age bracket," distress for being above the average age of 44, and "need for fresh ideas and enthusiastic energy of new employees" - clearly implying that the 44-years old Plaintiff was too old for the branch head position and shortly thereafter assigned the 29-years-old Mr. Farley to the acting branch head position in April 2000 until permanent appointment in February 2002. See ROI-03 p. 213, p. 414a-414b; ROI-02 p. 245, 483- 484.

3. Mr. King lied that there was vacancy announcement for the acting branch head position, because there was none and agency failed to produce any documents. See Ds'. Ex. 12, JKD p. 99.

4. The pattern of denied assignments and a series of fraudulent and secret promotions of significantly younger employees with inferior qualifications than Plaintiffs qualifications established that Mr. King intentionally discriminated against the 45-years old Plaintiffs born in Russia. ROI-03 p. 4-16, 25-31, 37, 131; ROI-02 p. 4-28, 36-44, 104, 180-190;.

5. Mr. King lied that assignment of Farley as acting branch head was initially scheduled to be 3 months because it was for 6 month and lasted for 22 month. Ds' Ex. 12, JKD p. 98-99 contradicting documents Ps' Ex. 15, ROI-02 p. 502, Paper #94.

6. Mr. King violated rules governing temporary promotions of more than 120 days by assigning Farley to the acting branch head position for

additional more than 500 days. ROI-03 p. 393 (B)(1), 394(e).

7. Farley never worked in the RF Technology branch prior to April 2000 and did not possess knowledge nor experience in the RF Technology related to the research and development of 6.1 and 6.2 type of work performed in the branch. Farley admitted that he did not do 6.1 and 6.2 work which was mostly research and development work done at RF Technology Code 741, and had no publications in technical journals. Ps' Ex. 15, SFD2 p. 34. Farley admitted that he worked in the acoustic measurements department at GS 11 level until 1994 and did not have any advanced degree. Ps' Ex 16, SFD2 p. 31.

8. King lied that the Human Resources department advised about the announcement being "just around the corner, but it ended up taking longer than anticipated" and contradicted the fact that the vacancy announcement was not announced for 22 months since the request for the vacancy announcement in Code 741 was not filed until 9/10/01 or about 21 months after the branch head vacancy was known on 1/1/00. Compare JKD p. 147 contradicting Ps' Ex. 17, ROI-03 p. 275, 279. The Human Resources office advertised the position on 11/9/01 and closed it on 11/23/01 in about a month after the request. ROI-03 p. 275, 279.

9. Mr. King lied that there was "a shortage of other quality people that he could trust the Department and contradicted the facts because 6 employees were certified and applied for the branch head vacancy and five of the 6 employees were from

the same branch. See Ps' Ex. 17, ROI-02 p. 319, 323. Ds'. Ex. 1 at ¶ 31, Ds'. Ex. 2 at ¶ 33.

10. Mr. Farley was treated preferentially when he was assigned without vacancy announcements for 22 months to the acting Branch Head position since April 2000 to February 2002, ROI-02 p 154, YSD p 263, ROI-03 p. 8.

In April 2000, Mr. King intentionally denied the most qualified 45-years old Plaintiff Dr. Yuri Stoyanov assignment and appointment to the acting Branch Head position in the RF Technology branch 741, but assigned unqualified and incompetent 29-years-old Mr. Farley who never worked in the branch 741. Farley did not possess required knowledge nor experience in the RF Technology related to the work performed in the branch. ROI-02 p. 13- 21, ROI-03 p. 9-10. Mr. King pre-selected 29 years old Farley as acting branch head and assigned him in April 2000 for 22 month until permanent appointment because of intentional discrimination against Plaintiffs on bases of age and national origin. The nexus of Mr. King's expressed intent to promote significantly younger employees because of "real paucity of employees in the 26 to 36 year age bracket," distress for being above the average age of 44, and "need for fresh ideas and enthusiastic energy of new employees" expressed in the March 2000 email and assignment of 29-years old Farley to the acting Branch Head position while denying the assignment to the 45 years old Plaintiff in April 2000, clearly established direct evidence of age discrimination against Plaintiffs. Plaintiffs were substantially the same age as Defendant King and older than the average age of 44 years. Mr. King lied that assignment of Farley as acting branch head was initially scheduled to be 3 months because it was for 6

month and lasted for 22 month as evident in the record. Mr. King violated rules governing temporary promotions of more than 120 days by assigning Farley to the acting branch head position for additional more than 500 days to deny assignment and promotion to Plaintiffs because of intentional discrimination against Plaintiffs on account of age and national origin.

King lied that the Human Resources department advised about the announcement being "just around the corner," contrary to the evidence in the record that the request for the vacancy announcement in Code 741 was not filed until 9/10/01 or about 21 months after the Branch Head vacancy was known on 1/1/00. The vacancy announcement was not announced for 22 months to cover up intentional discrimination against Plaintiffs. Prior to April 2000, Farley never worked in the RF Technology branch and did not possess knowledge nor experience in the RF Technology related to the research and development type of work performed in the branch. Mr. King lied that there was "a shortage of other quality people that he could trust the Department" and contradicted the facts because 6 employees applied and were certified for the branch head vacancy and five of the 6 employees were from the same branch 741. Mr. King intentionally treated Plaintiffs disparately and denied Plaintiffs assignment and promotion because of age and national origin while significantly younger Farley with far inferior qualifications was treated preferentially when he was assigned to the acting Branch Head position without vacancy announcement for 22 months since April 2000 to February 2002. The evidence in the record established that Plaintiffs timely contacted the EEO counselor and specifically raised the issue of denied assignment to the acting

branch head position because of continuous intentional discrimination against Plaintiffs.

Plaintiffs clearly established strong *prima facie* case of age, national origin, and disparate impact discrimination. Plaintiffs also created jury question by demonstrating that Defendants deliberately lied and proffered pretext unworthy of credence. However, Judge Bennett abused discretion and closed Plaintiffs consolidated action by granting Defendants motion for judgment without addressing Plaintiffs' claim of denied position as acting Branch Head and denied Plaintiffs' Motion for Additional Findings (paper #108). Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment.

**Issue 5. Defendants Unlawfully Deprived Plaintiffs of Constitutional rights in Violation of Federal Laws.**

As explained in the Docketing Statement, Judge Bennett abused discretion[4] and clearly erred finding in the 7/25/06 Memorandum Opinion on page 11: "[f]irst, Plaintiffs do not assert causes of action under §1983 in their complaints" contrary to the facts that Plaintiffs identified individual Defendants "acting under color of law" and facts of Defendants' conspiracy to commit perjuries, fraud, and deceptions to deprive Plaintiffs of federal rights, and to cause Plaintiffs severe injury to reputation in the community, mental and physical pain, anxiety, and economic damages. In fact,

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[4] Plaintiffs motions to amend the complaints were filed during discovery on 9/28/06 about a month after scheduling order; however Judge Bennett abused discretion and denied Plaintiffs' requests to amend the complaints; see 11/7/06 Transcript of Motions Hearing, pp 16-20, 28-31, 35-37.

Plaintiffs identified direct evidence of conspiracy to escalate discrimination, violations of laws, abuse of authority, when on September 30, 2002, the Plaintiffs' third-level supervisor instructed his subordinates: "It is time to crack down on them [Plaintiffs]... Dave Caron has mentioned it twice now. What do you recommend?" See Plaintiffs Exhibit 23 in the Plaintiff's Opposition, Paper #27. In addition, Plaintiffs were not required to explicitly identify the statue and District Court acknowledged on page 6: "Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim showing the pleader is entitled to relief." *Migdal, 248, F.3d at 325-326*; see also *Swirkiewich v. Sorema N. A., 534 U.S. 506, 513 (2002)* (stating that a complaint need only satisfy the "simplified pleading standard" of Rule 8(a)). Moreover, Complaints "need not plead law or match facts to every element of a legal theory." *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000)(quoting *Bennett v. Schmidt,* 153 F.3d 516, 518 (7th Cir. 1998)). Therefore, Plaintiffs were not required to explicitly identify 42 U.S.C §1983 in the complaints.

Furthermore, the federal district courts already had jurisdiction granted by 28 U.S.C. 1343(3) and Plaintiffs identified in the complaints individual Defendants' violations and illegal acts that deprived Plaintiffs of constitutional rights and rights as set in Federal laws 5 U.S.C §2302 and 5 U.S.C § 2301 requiring that federal personnel management be implemented consistent with the merit system principle[5]. Plaintiffs' complaints concern the liability

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[5] Judge Bennett abused discretion and dismissed claims based on 5 U.S.C. §§2301-2302 by partially quoting prohibited personnel practices related to discrimination (see footnote 17 in the Memorandum Opinion §V. B.) while §2302(b)(4), (6), (8), (9), (10),

of the individual Defendants, Jebsen, King, Davies, Farley, and Caron as agency officials acting "under color of law" to deprive Plaintiff of constitutional rights granted by federal laws. The Supreme Court clearly established that such officials are liable if their actions or orders violate constitutional rights and laws; the statute, 42 U.S.C §1983, reflects a congressional judgment that a "damages remedy against offending party is a vital component of any scheme for vindicating cherished constitutional guaranties," *Owen v. City of Independence, 445 U.S. 622, 636 (1980).* Suits for damages against officials in their individual capacities are valid, *D'Aguano v. Gallagher, 50 F.3d 877, 879, (1995); Bivens v. Six Unknown Named agents of FBI, 403 US 388 (1971).* In the 7/25/06 Memorandum Opinion on page 13, the District Court acknowledged that Defendants "neither challenge Plaintiffs' affidavit nor argue the allegations contained in those affidavits are insufficient" for initiating a lawsuit. The original complaints specifically identified individual Defendants acting "under color of law" and violating laws and Plaintiffs' rights.

Plaintiffs brought civil actions and tort claims against individual Defendants under the authority of *Bivens* for damages arising from intentional violations of Plaintiff's rights and federal laws 5 U.S.C §2302-2301 including criminal statue[6], 18 U.S. C. § 512.

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(12) were omitted and §2301(b)(1), (5), (6), (8), (9) not mentioned, that established individual Defendants' violations of federal laws specifically securing Plaintiffs' rights, privilege, or immunity.

[6] Judge Bennett abused discretion finding that criminal statute does not give rise to a civil cause of action; however, Plaintiffs have implied private rights of action because of permanent injuries, severe suffering, and deprivations of Plaintiff's rights as a direct and proximate result of the Defendants' criminal conduct.

However, Judge Bennett abused discretion and made finding unsupported by substantial evidence in the 7/25/06 Memorandum Opinion on page 11: "[s]econd, the allegations in Plaintiffs' Complaints are noting more than allegations of employment discrimination" contrary to the claims of violations of laws and regulations, fraud and deliberate misrepresentations, conspiracy, obstruction of official process, abuse of authority, abuse of administrative power, malicious abuse of process, intentional infliction of emotional distress, aiding and abetting violations of civil rights laws, violations of human rights laws, and perjuries in addition to violations of ADEA and Title VII laws committed by the individual Defendants. "When section 1983 is used as a parallel remedy for violation of section 703 of Title VII [42 U.S.C. 2000e], the elements of the two causes of action are the same." *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 n. 16 (11th Cir. 1982). Sufficient precision and factual specificity raise a genuine issue under 42 U.S.C §1983 as to the illegality of individual Defendants' conduct and intentional violations of Plaintiff's rights. The U.S. Supreme Court affirmed that "Section 1983 provides a cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory"; See *Gomez v. Toledo, 446 U.S. 635 (1980).* If the EEOC investigation is too narrow, a plaintiff should not be barred from raising additional claims in district court; see *Hicks v. ABT Assocs., Inc, 572 F.2d 960, 965 (3d Cir. 1978).* Judge Bennett abused discretion, made arbitrary and clearly erroneous decision unsupported by substantial evidence and wrongfully dismissed Plaintiffs'

intentional tort claims (Counts IV-XI) for lack of subject-matter jurisdiction and substituting United States for individual Defendants Jebsen, King, Davies, Farley, and Caron with respect to following claims: a) fraud and deliberate misrepresentations, b) conspiracy, c) obstruction of official process, d) abuse of authority, e) abuse of administrative power, f) malicious abuse of process, g) intentional infliction of emotional distress, h) aiding and abetting violations of civil rights laws, i) violations of human rights laws, j) perjuries, and k) obstruction of justice, in addition to violations of ADEA, Title VII, WPA, violations of federal laws 5 U.S.C §2302-2301, and Plaintiffs' constitutional rights. Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment with regard to Counts IV – XI.

**Issue 6. Discrimination by Fraudulent Promotions Under "Accretion of Duty" and by hiding vacancy announcements.**

As stated in the Court's Memorandum Opinion of July 25, 2006 on pp. 17-18, claims of fraudulent promotions of W. Nichols, S. Russell, W. Stephens, D. Vinh, G. Miller, K. Wilson, R. Renfro, survived the first round of Defendants motion for judgment, but erroneously granted in the August 15, 2007 Memorandum Opinion because of abuse of discretion or otherwise not in accordance with law.

**Supporting Facts and Argument.**

1. The evidence in the record established that Plaintiffs were intentionally discriminated against when Mr. W. Nichols, Mr. S. Russell, Mr. G. Miller, Mr. W. Stephens, Mr. D. Vinh, Mr. J. Young, Mr. R. Renfro, Mr. D. Mayo, Mr. P. Honke, Mr. K. Wilson were promoted fraudulently and secretly without any vacancy announcement or by manipulating selection

process and hiding vacancy announcements. Plaintiffs' (A. Stoyanov) Exhibit 1 at ¶ 28-30, Plaintiffs' Exhibit 1 (Y. Stoyanov affidavit) at ¶ 30-32.

2. Russell admitted that King assigned him to a position with potential for promotion and then promoted him without vacancy announcement. P's Ex. 46, SRD p. 14, 16, 20.

3. King lied that he did not promote employees to ND-5 level by accretion of duties. Ps' Ex. 46, JKD2 p. 39-41.

4. King lied: "I don't recall" responding to questions with regard to promotions to ND-5 level using accretion of duties without any vacancy announcement of the identified employees. JKD2 p. 73.

5. King lied with regard to promotion of Mr. D. Vinh to ND-5 level by using accretion of duties on 03/11/2001. JKD2 p. 75. Vinh was hired at ND-4 level (Vacancy Announcement # DEA 98-119 closing date 9/17/99. Selection was made by Mr. King on 6/5/00) P's Ex. 12, D's Ex 27

6. King admitted that practice of promotions by accretion of duties is not used now [since about August 2002, because they are considered to be fraudulent]. Ps' Ex. 46, JKD2 p. 77-78.

7. King violated regulations specifically requiring that "The potential for future promotion must be made known to all potential applicants" See Ps' Ex. 10, ROI-03 p. 394 (e).

8. King and Davies were hiding promotion of Nichols during the administrative process and lied that Nichols left the organization without being

promoted. See Deposition of J Davies (JDD) p. 245-246. JKD p. 76.

9. In 2001, Mr. King was acting Head of Code 70, when King fraudulently promoted Mr. Miller using pretext of accretion of duties to cover up intentional discrimination against Plaintiffs and to deny Plaintiffs opportunity to apply for promotion. King lied that he did not work in the Stealth Systems Office from around 1997 to about 1999 and contradicted facts and the testimony of Mr. Dirlick. JKD p. 94 compare to SDD p. 21, 24-25; ROI-03 p. 12-14, 134-137. ROI-02 p. 16-21.

10. Defendants were hiding promotion of Nichols and others during the administrative process and lied that Nichols left the organization without being promoted. See JDD p. 245-246. JKD p. 76; ROI-02 p. 579-570; See list of more than 20 individuals promoted by "accretion of duties" Ps' Ex. 46

11. The vacancy announcement CAR 02-0045 for Mr. Young (DOB 3/22/1962 US) was not advertised in the Code 70 and Mr. Young admitted that he was informed that the position was advertised P's Ex. 46, (J. Young Deposition) JYD p. 17-19. Only Mr. Young's job series 861-Aerospace Engineer was included in the vacancy announcement CAR 02-0045 while Plaintiffs' job series 1310-Physicist was intentionally excluded from the interdisciplinary position specifically related to the ship stealth technologies. See Ps' Ex. 46.

In the Plaintiffs' Opposition (paper # 94), Plaintiffs established a clear pattern of age discrimination against Plaintiffs because of secret and fraudulent promotions of identified individuals under the "accretion of duties" at the time of promotion.

Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law by granting Defendants' motion for summary judgment in the August 15, 2007 Memorandum Opinion by finding that "Plaintiffs' primary response [to Defendants' proffered reasons] is that the promotion of [W. Nichols, S. Russell, W. Stephens, D. Vinh, G. Miller, K. Wilson, R. Renfro] was fraudulent... Plaintiffs support this assertion with nothing more than conclusory statements and declarations," contrary to the evidence Plaintiffs identified regarding the assignments to a position with potential for promotion and agency officials' violations of the regulations specifically requiring that "The potential for future promotion must be made known to all potential applicants" See Ps' Ex. 10, ROI-03 p. 394 (e). In fact, footnote 4 in the 8/15/07 Memorandum Opinion found that Defendants did not challenge the affidavit submitted by Plaintiffs averring that "[t]he claims of intentional discrimination against Plaintiff[s] with regard to fraudulent promotions of Russell, Miller, Stephens, Renfro, Wilson, and Nichols were developed by reasonable investigation after filing original complaint February 2002..." Plaintiffs established a strong *prima facie* case of age, national origin, and desperate treatment discrimination and showed that Defendants were hiding fraudulent promotions under the "accretion of duties" pretext. Fraud with the promotions under the "accretion of duties" and by hiding vacancy announcements for Mr. Young and similar fraud with the promotion of Mr. Honke and Ms. Vanderveer to deny Plaintiffs promotion, create a jury question of fact and a reasonable factfinder would certainly be entitled to infer that Defendants explanations are nothing more than a post hoc

rationale invented for the purposes of litigation. Plaintiffs showed that they were unaware of promotion opportunities because the agency officials violated agency regulations by secretly promoting individuals with inferior qualifications than Plaintiffs' qualifications. Compare *Williams v. Giant Food Inc,* (4th Cir. 2004) (concluding that Williams created a genuine issue of material fact relevant to her failure-to-promote claims and can establish a prima facie case if she can show that she was unaware of promotion opportunities because the company did not follow its own policy); Roberts v. Gadsden Mem'l Hosp., 835 F. 2d 793, 797-99 (11th Cir. 1988) (concluding that the plaintiff established a prima facie case of discriminatory failure to promote where his employer never posted notice of the vacancy and used informal communications in social gatherings to make promotion selections). Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment with regard to fraudulent promotions.

**Issue 7. Denied Promotion to Chief Scientist Position.**

Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law with regard to denied promotion to the Chief Scientist position.

**Supporting Facts and Argument.**

1. The Chief Scientist position was vacant until May 2002, ROI-03 p. 267, JKD p. 254-255.

2. King lied that Chief Scientist position was not a formal position; Compare King's Affidavit ROI-03 p. 208 with Department Chart ROI-02 p. 299-305.

3. The pattern of intentional discrimination against Plaintiff on bases of age and national origin was established in the claims of discrimination. See Issues 1, 2,3, 4, 6; also ROI-03 p. 29-31, 71-72; 185-187; ROI-02 p. 40-43, 104-105, 218-219.

4. Mr. Russell was not qualified for the Chief Scientist position and admitted that; P's Ex. 20 (RD) p. 80, Paper #27.

5. Russell as mechanical engineer in hydroacoustic technology had far inferior qualifications than Plaintiffs qualifications and experience in Radio Frequency technology and Russell admitted that he was not promoted to GS13 level until 1998, while Plaintiff already had developed expertise in 6.2 program and were at GS13 level since 1989; P's Ex. 20 (RD) p. 77-79, 15-19; see ROI-02 p. 42, YSD 255-257, ROI-03 p. 30

6. King admitted that he did not assign additional duties to Mr. Russell, JKD p. 254.

7. Plaintiffs as experts in electromagnetics, RF Technology, signature reduction, performed research work and had initiated, prepared and presented new Science & Technology programs, technical reports, papers, advised management, reviewed reports and papers, and performed duties similar to the Chief Scientist. ROI-02 p. 163-164, 218-219, 362-367, 40-43, ROI-03 p. 185-187, 136-137, 317-323, 29-31.

8. King was lying that it was Davies who promoted Russell, JKD p. 254. Davies testified that King promoted Russell to ND-5 position; P's Ex. 6 (DD) p. 260.

9. King lied that the Chief Scientist position is in a specific technology area, the manager of the 6.2

Discovery and Invention program, contrary to the previous Chief Scientist C. Weller who did not manage 6.2 program since 1994 to 2001, YSD p 258.

10. King intentionally discriminated against Plaintiff denying opportunity for promotion by secretly promoting and assigning Russell with inferior qualifications to the Chief Scientist position without vacancy announcement, ROI-02 p. 163-164; ROI-03 p. 137.

The evidence in the record established that Mr. King fraudulently and secretly promoted and assigned Mr. Russell to the vacant ND-5 Chief Scientist position to escalate discrimination against Plaintiffs and deny Plaintiffs promotion. The pattern of intentional discrimination against Plaintiffs was established because of fraudulent promotions under the "accretion of duty" and by hiding vacancy announcements. Mr. Russell's qualifications in hydro-acoustics and experience were far inferior to Plaintiffs' qualifications for the Chief Scientist position in the Electromagnetic Signature Technology Department. Plaintiffs were the most qualified for the ND-5 Chief Scientist position in the Department and showed that King lied and proffered pretext unworthy of credence. Plaintiffs established strong *prima facie* case of discrimination on bases of age, national origin, desperate treatment, and retaliation for participation in protected activities. Plaintiffs showed that Defendants intentionally denied Plaintiffs promotion opportunities by secretly promoting and assigning Russell with inferior qualifications than Plaintiffs' qualifications to the Chief Scientist position. Cf. *Williams v. Giant Food Inc*, (4th Cir. 2004). Moreover, the pattern of antagonism was evident throughout the entire course of events and created a jury question with regard to

material facts related to Russell's fraudulent promotion and assignment to the Chief Scientist position. Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment with regard to the claim of intentional discrimination with assignment to the ND-5 Chief Scientist position.

**Issue 8. Violations of ADEA, and Title VII antiretaliation Provisions for Denied Promotions.**

The undisputed evidence in the record established that Defendants retaliated against Plaintiffs and intentionally denied promotions for opposing discrimination since 2000 and for participation in EEO discrimination complaint process since 2002.

**Supporting Facts and Argument.**

1. Plaintiff Dr. Yuri Stoyanov opposed obvious discrimination in the Spring/Summer time in 2000, not long after King assigned significantly younger incompetent Farley to the acting Branch Head position in the RF Technology branch in April 2000. Plaintiff asked Mr. King why Mr. King discriminated against him and denied him assignment to the acting Branch Head position. Ds'. Ex. 2 at ¶ 34, Paper 87.

2. Mr. King admitted that Dr. Yuri Stoyanov opposed discrimination since 2000. See Ps' Ex. 18, JKD2 p. 29-31, Paper 94.

3. Facts identified in the issues 1, 2, 6, 12 also support causal connection between opposing discrimination and the adverse employment actions in addition to specific opposition: a) On November 27, 2000, Plaintiff appealed to Mr. King and opposed discrimination by asking Mr. King to explain why

work was redirected, positions of responsibility denied, and assignment to the acting branch head position was denied. See Ps' Ex. 20, ROI-02 p. 58-59; b) On December 5, 2000, King called meeting and formally denied Plaintiff incentive pay. See Ps' Ex. 20, ROI-02 p. 506-507; c) Since 12/12/00, Plaintiff had to make a record during the meeting with Mr. King, Mr. Davies, and Mr. Farley to prevent deliberate misrepresentations. Ps' Ex. 21, ROI-02 p. 19, 520; d) On February 12, 2001, King in conspiracy with Davies and Farley escalated harassment, Ps' Ex. 21, ROI-02 p. 60-62; 65, 510, 508, 512; e) On April 11, 2001, Dr. Yuri Stoyanov appealed to Mr. King to take necessary steps to stop Farley's unprofessional behavior. Ps' Ex. 23, ROI-02 p. 523, 526-528; f) on Aprils 26, 2001 issues of discrimination and harassment addressed. ROI-02 p. 527; g) In September 2001, King denied promotion and position of the team leader and retaliated against Plaintiff by denying directly funded projects and work, ROI-02 p. 486-487; h) Farley admitted that King and Davies instructed Farley to assign Dr. Yuri Stoyanov to escort duties in toilet rooms of Building 15 in 2001. SFD2 p. 57; i) Dr. Yuri Stoyanov appealed to Farley denial of incentive pay. ROI-02 p. 535-539, p. 75; j) On December 21, 2001, Dr. Yuri Stoyanov opposed intentional discrimination and appealed denial of incentive pay demo points to King and also requested notes of April 26, 2001 meeting, ROI-02 p. 540.

4. On February 4, 2002, Plaintiffs filed EEO discrimination complaints because of egregious discrimination on bases of age and national origin and in retaliation for opposing discrimination. See ROI-02, p. 46, 76; ROI-03, p. 36.

5. Plaintiffs were denied promotion to Branch Head position in Code 743 when vacancy announcement was delayed since April 2002. ROI-03, p. 31, 78; ROI-02, p. 31, 104-105.

It is undisputed that Plaintiffs opposed obvious discrimination against them and responsible management officials were well aware of allegations of discrimination since Spring/Summer 2000. "[P]rotesting what an employee believes in good faith to be a discriminatory practice is clearly protected conduct." See *Aman v. Cort Furniture Rental Corp.*, 85 F.3d at 1074, 1085 (1986). Plaintiffs established strong *prima facie* case of retaliations and the causal connection is easily established by considering close temporal proximity between Plaintiffs protected activities and retaliations against Plaintiffs for the adverse employment actions because of the temporal proximity giving rise to an inference of causation. Based on the circumstantial evidence of a causal connection and this proximity, Plaintiffs created a jury question on causation with evidence when Plaintiffs were denied promotion by accretion of duties in spite of accreted duties of developing new program or acting as branch head: (1) less than a month or two after Plaintiffs opposed the discrimination, Bill Stephens was fraudulently and secretly promoted to ND-5 level on 6/18/2000, (2) Gary Miller was fraudulently and secretly promoted to ND-5 level on 3/11/2001 within a short period of time after Plaintiffs opposed discrimination in writing in December 2000, January 2001, and February 2001. See Facts a)-d). (3) David Vinh was fraudulently and secretly promoted to ND-5 level on 3/11/2001, [same temporal proximity as in (2) above]. (4) Paul Honke was fraudulently and secretly promoted to ND-5 level in June 2001, a short period of

time after Plaintiffs opposed discrimination. See Facts at d)-f)] (5) Steven Farley was fraudulently promoted to ND-5 on 2/4/2002. See Facts at i)-j). Plaintiffs were denied promotion within a short period of time after opposing discrimination and participating in EEO discrimination complaint activity: (6) Steven Russell was fraudulently and secretly promoted to ND-5 level on 3/24/2002, See Facts at i)-j), Issues 1, 2, 3, 4, 6, 7, 9. (7) Also, Plaintiffs were denied assignment to the Chief Scientist position in retaliation for participation in EEO discrimination complaint activity a short period of time after filing formal EEO discrimination complaints and complaints of reprisal in March 2002 and April 2002. (8) John Young was fraudulently and secretly promoted to ND-5 level in April 2002, while Plaintiffs' job series 1310-Physicist was intentionally excluded and Plaintiffs were denied the vacancy announcement and promotion within a short period of time after opposing discrimination and participating in EEO discrimination complaint activity. Temporal proximity between the acts of intentional discrimination against Plaintiffs and Plaintiffs opposition to discrimination and participation in the EEO discrimination complaint activities will permit a jury to find causation. In addition to the temporal proximity, Plaintiffs proved causation by showing the evidence of the pattern of antagonism and the practice of intentional discrimination against Plaintiffs on bases of age and national origin. In fact, Plaintiffs established the motive for intentional discrimination against Plaintiffs when the responsible management official Mr. King repeatedly expressed and memorialized in the email a discriminatory animus based on age stating that "we cannot stand the age creep" and systematically and intentionally

discriminating against Plaintiffs because of age. Furthermore, Plaintiffs proved causation by looking at the evidence as a whole. "[A] discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Andrews*, 895 F.2d at 1469, 1484 (3d Cir. 1990). Plaintiffs established strong *prima facie* case of retaliations for participation in protected activities; however, Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law granting Defendants' Motion for Summary Judgment with respect to retaliation claims regarding promotions of S. Russell and J. Young because of Plaintiffs participation in prior EEO activities and promotions of W. Stephens, G. Miller, D. Vinh, P. Honke, and S. Farley because of Plaintiffs' opposition to discrimination. Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment.

**Issue 9. On February 21, 2002, Defendants Retaliated by Changing Plaintiffs' Work Schedule.**

The undisputed evidence in the record established that Defendants retaliated against Plaintiffs intentionally changing Plaintiffs' work schedule on February 21, 2002.

**Supporting Facts and Argument.**

1. On February 21, 2002, The EEO Counselor Mr. A. Dobbins contacted Farley about EEO discrimination complaints filed by Plaintiffs. ROI-02 p. 46.

2. Defendants admitted that they made statements to the EEO Counselor about allegations of EEO discrimination. ROI-03 p. 154, 195, 213, 234.

3. On February 21, 2002, King and Davies conspired with Farley to retaliate against Plaintiffs by changing Plaintiffs' work schedule. Ps' Ex. 29, JDD p. 226. ROI-03 p. 152-254.

4. Farley lied that nobody told him to send email that he will enforce "core hours" rule changing Plaintiffs work schedule. SFD p. 98-99. Davies testified that Farley was directed to change Plaintiffs' work schedule by sending email enforcing "core hours". JDD p. 226.

5. Farley admitted that he discussed Plaintiffs work schedule with King when Farley was first contacted by EEO counselor in February 2002. Ps' Ex. 29, SFD2 p. 54.

6. Farley admitted that both Plaintiffs were coming to work around 10:00 most of the time. Ps' Ex. 29, SFD2 p. 59.

7. On 2/28/02, King lied during the meeting that enforcement of the core hours is a department wide policy contrary to the Sign In-Out Policy of 7/5/02 stating that some units of Code 70 abandoned the requirement to sign in-sign out. Ps' Ex. 30, ROI-03 p. 345 and ROI-02 p. 557.

8. The responsible management officials retaliated against Plaintiffs by changing Plaintiff's work schedule of the last five years only in one branch Code 741 where both Complainants worked. P's Ex. 29, HT. p. 361, JDD p. 237.

Plaintiffs clearly established strong *prima facie* cases of retaliations and hostile work environment under ADEA and Title VII when Defendants retaliated against Plaintiffs and, to harm Plaintiffs, intentionally changed Plaintiffs' work schedule on February 21,

2002. The 2/21/02 order was directed only against Plaintiffs in order to escalate discrimination against Plaintiffs and to retaliate by imposing hardship because most of the employees in the branch Code 741 who did not have regular schedule comparable to Plaintiff's were not affected and the 2/21/02 order enforcing core hours in only one branch did not affect employees in other two branches of the department. The nexus between the adverse action of the 2/21/02 order enforcing core hours and the EEO Counselor's contact with the management on the very same day established direct evidence of reprisal. The Supreme Court held that " Context matters. ... A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children [or Plaintiffs with an elderly father, as in this case]. " *Burlington N. & S.F. Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006).* Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law granting Defendants' Motion for Summary Judgment with respect to retaliation in this claim. Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment.

**Issue 10. Defendants intentionally discriminated and retaliated against Plaintiff Dr. Yuri Stoyanov by transferring Plaintiff involuntarily to different technology department.**

Judge Bennett made clearly erroneous statement that Plaintiff failed "to furnish sufficient evidence to support

these claims" contrary to the evidence[7] Plaintiffs presented. in Paper No. 94.

**Supporting Facts and Argument.**

1. On April 25, 2002, King escalated discrimination and retaliated against Dr. Yuri Stoyanov and intentionally transferred Dr. Yuri Stoyanov to another technology department under fraudulent pretext to balance workload. Ps' Ex. 31, ROI-02 p. 378, 383-384, 162-163

2. The transfer was based on fraud. ROI-02 p. 163. King committed fraud by transferring Plaintiff into position that had specific requirement for expert knowledge of target strength model, which Plaintiff did not have. Ps' Ex. 33, ROI-02 p 239 vs. P's Ex. 31, ROI-02 p. 382, 168; Ps' Ex. 15, YSD p. 86, 250-251. Plaintiff timely reported prohibited personnel action and fraud committed to the Office of Special Counsel (OSC) in June 2002 and agency administration through the chain of command. Ds'. Ex. 2 at ¶ 49; ROI-02 p. 385, 390, 30-32.

3. Plaintiff had directly funded work in Code 741 at the time of transfer because Director of Research provided funding to Plaintiff in March 2002. Ps' Ex. 15, YSD p. 251-252. Ps' Ex. 33, ROI-02 p 397-398.

4. King conspired with his subordinates to deny Plaintiffs work on funded projects available in department Code 74. ROI-02 p 158-162.

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[7] Plaintiffs presented sufficient evidence in the original Plaintiff's Memorandum in Support of Opposition, but Judge Bennett abused discretion and denied Plaintiffs Motion for Extension of Page Limit in the consolidated case and Plaintiffs had to submit Condensed Memorandum in Support of Opposition; see Paper Nos. 91, 92, 94.

5. There was plenty of directly funded work Plaintiff could do on funded projects available in Code 74 that King intentionally denied Plaintiffs. P's Ex. 33, HT p. 291, 295, 292, 300. Code 74 received $ 9.6 M in FY01 and received $ 14.6M in FY02. P's Ex. 42 Attachments # 18 and 19. YSD p. 222-223, 237-238, 242-243. ROI–02 p 153-166, 210, 212, 178-190. ASD p. 253, 257, 261-263.

6. King lied that Code 72 had more than adequate funding contradicting agency documents that show other employees in Code 722 were on overhead funding. P's Ex. 33 Attachments # 16 and 17.

7. Plaintiff was replaced by someone outside the protected class. Defendants hired Jerry Smith Jr. (American; DOB: 1/22/1973), Mark Mirotznick (American; DOB: 9/4/1965) and Joseph Stratton (American; DOB: 7/14/76) to replace Plaintiffs in the RF Technology Code 741. Ps' Ex. 47, ROI-02 p. 157, 159. King by fraud promoted other employees; see facts in Issues 1, 2, 3, 6, 7; Ps' Ex. 46 (High Greade Promotions Code 70)

Plaintiff established a strong *prima facie* case of disparate impact, age, national origin, and retaliations under ADEA and Title VII because of Plaintiff's age, national origin, and participation in protected EEO discrimination complaint activity. Defendants by fraud transferred Plaintiff to another technology to escalate discrimination and retaliate against Plaintiff deliberately terminating Plaintiff's 16-years career in Radar Frequency technology Code 741. King was well aware of the Plaintiffs' protected activity at the time of the adverse action, and the evidence of the temporal proximity between the acts created a jury question on causation with regard to retaliation against Plaintiff.

Plaintiff was replaced by someone (Mirotznick, Smith, Stratton) significantly younger outside of the protected classes (M. Mirotznick was hired with the comparable or higher salary than Plaintiffs' salary). King conspired with his subordinates to deny Plaintiffs work on funded projects available in department Code 74 that King controlled to create a pretext that there was "difficulty securing direct work" for Plaintiff contrary to the evidence that there was plenty of directly funded work Plaintiff could do on funded projects available in Code 74. In addition, Plaintiff had directly funded work in Code 741 at the time of transfer because Director of Research provided funding to Plaintiff in March 2002. About 23 employees were promoted from ND-4 to ND-5 level mostly by accretion of duties while Plaintiffs were denied promotions because of age, national origin, and retaliations for opposition to discrimination and participation in EEO discrimination complaint activity in Code 70. Plaintiff showed that Defendants offered pretext based on King's self-serving fabrications. Plaintiffs created a jury question of intentional discrimination on bases of age, national origin, and retaliation and the disparate impact claims. Judge Bennett abused discretion and made clearly erroneous decision unsupported by substantial evidence Plaintiffs presented. Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment.

**Issue 11. Defendants retaliated against Plaintiffs by assigning tasks incompatible with professional duties, using threats with disciplinary action, redirecting funding, denying transfer.**

Plaintiffs identified pattern of Defendant's intentional discrimination and retaliations against Plaintiffs to aggravate harassment and create hostile work environment as identified in the following claims:

**Supporting Facts and Argument.**

1. On April 11, 2002, Plaintiff Dr. Aleksandr Stoyanov was assigned a task incompatible with his professional duties to escalate discrimination and retaliations, to aggravate harassment and create hostile work environment. See Ps' Ex. 32, ROI-03 p. 18, 327-321, EEOC Hearing Transcripts p. 332-333, 336-337, 552, 554-558. ASD p. 293-300. Farley admitted that junior employees do such job. P's Ex. 3 HT p. 154. Agency representative Mr. Caron participated in conspiracy to escalate discriminations against Plaintiffs; Caron refused to respond to questions who and when informed Caron about Plaintiff's EEO activity. Ps' Ex. 32, DCD p. 36, 38-43. Farley lied that other employees were not available to deliver the antennas. ASD p. 293-300, ROI p. 327-329. Mr. Caron conspired with Mr. Young to commit perjuries, to obstruct and impede official process, and to deny Plaintiff fair adjudication of discrimination complaints when Mr. Young lied during the EEOC hearing and depositions. HT p. 552, 554-558. Administrative Judge found that agency witness lied (See Bench Decision p. 12) Ps' Ex. 32.

2. On July 29, 2002, Defendants intentionally discriminated and retaliated against Plaintiff Dr. Aleksandr Stoyanov by ordering Plaintiff to provide a written communication to summarize each day he worked. ROI-03 p. 34. Defendants intentionally retaliated against Plaintiff and aggravated harassment to create hostile working environment and to harm Plaintiff. Ds' Ex 1 ¶ 53-57. Plaintiff's appeals to stop

discrimination and harassment were intentionally denied and no remedial measures were taken. See ROI-03 p. 338-340. Farley lied that "nobody" instructed him to impose the requirement and it was his own initiative. Ps' Ex. 39, ASD 312-313, ROI-03 p. 71, 242, 189, 338-340, ROI-02 178-225, ALD[8], p. 13-14, JDD p. 298-299, HT p. 200-202, 404, 493-495, HT p. 593, 595-596, SFD2 p. 77, EEOC Administrative Judge admonished King for lying because aggravated harassment and requirement to write daily summaries of work was rescinded only after Plaintiff appealed to the EEO Chief and Commander. HT p. 493-495. Jebsen's July 29, 2002 Email established direct evidence of intent to continue intentional discrimination and retaliations: "... I don't like the sound of mediation; implies we have some grounds for compromise."

3. In September 2002, Plaintiff Dr. Aleksandr Stoyanov was accused of insubordination and threatened with disciplinary actions in retaliation for participation in EEO activities. On August 19, 2002, Dr. Aleksandr Stoyanov amended complaint and added additional claims of intentional discrimination and retaliations for participation in EEO activity. Ps' Ex. 39, ROI-03 p. 34. To obstruct and to cover up intentional discrimination against Plaintiffs, agency representative Mr. Caron conspired with the management officials to deny Dr. Yuri Stoyanov's request for list of promotions in Code 74. Ps' Ex. 40, ROI-02 p. 574-575, 572, 570. On August 22, 2002, Mr. Caron responded on behalf of Captain Petri and denied request for list of promotions in Code 74. ROI-02 p. 576-577. Mr. King retaliated and aggravated harassment against Plaintiff using threats

[8] Defendants' Exhibit 5, A. Luna Deposition (ALD)

of insubordination and disciplinary action by email of 9/12/2002.

4. In September 2002, Defendants intentionally discriminated and retaliated against both Plaintiffs and denied Dr. Yuri Stoyanov directly funded $95000.00 project he received and denied Plaintiff's request for the copy of the funding document. See Ps' Ex. 42. Defendants conspired to deny Plaintiff funded project that generally goes to the person that went out and got the work. (G. Jebsen Deposition) GJD p. 66. Mr. King perjured himself stating that $95,000 funding came to James Wood, See King's Deposition (KD) p. 270-271 v. Y. Stoyanov Deposition (YSD ) p. 48 as shown in EEOC Supplement to complainant's Reply in Opposition.

5. In September 2002, Defendants conspired to deny Plaintiff Dr. Yuri Stoyanov transfer back to work on the funded project he received in department 74. During the EEOC July 2003 Hearing, Plaintiff showed that Defendants intentionally denied transfer to department 74 where Plaintiff worked since 1986 until he filed first EEO discrimination complaint and then by fraud was involuntarily transferred to another department in April 2002, because more than $1.7 million dollars worth of directly funded work was carried over from FY02 to FY03 in department 74. P's Ex. 42, HT p. 300-301. The September 2002 request to transfer to Code 74 was intentionally denied to keep Plaintiff in department 72 and continue intentional discrimination against Plaintiffs by denying funded Malibu antenna project. See Ds'. Ex. 2 at p. 12 at ¶ 14.

6. On 9/23/02, Defendants assigned work incompatible with the Plaintiff's professional duties to aggravate harassment and to humiliate Dr. Aleksandr Stoyanov. The work assignment on

9/23/02 was incompatible with the Plaintiff's professional duties and was designed to aggravate harassment and to humiliate Plaintiff, Ps' Ex. ASD 301-302. Farley was suborned by the agency representative Caron and lied that "he was trying to get him involved with some of the work" since pulling cables was incompatible with Plaintiff's professional duties and was intended to aggravate harassment and escalate intentional discrimination. Defendants treated Plaintiff disparately than other similarly situated employees to create intolerable working conditions in malicious attempt to provoke non-compliance with clearly humiliating and discriminatory assignments and to create a pretext for disciplinary action. See Ds'. Ex. 21 at p. 11 §12.

An adverse employment action is actionable where the employee's job is changed in a way that injures his career, the skill requirements of his present job altered, changed in a way that subjects him to a humiliating, degrading, or otherwise negative alteration in his workplace. See, e.g., *Dahm*, 60 F.3d 253, 256-57 (7th Cir. 1994); *Chuang*, 225 F.3d 1115, 1125-26 (9th Cir. 2000), *White, 126 S. Ct. 2405, 2415 (2006)*. The cumulative effect of numerous circumstances of discriminatory and retaliatory animus was evident throughout the entire course of events and revealed a pattern of antagonism, which overcame any doubts of intentional discrimination and retaliations against Plaintiffs. Accordingly, Plaintiffs established strong prima facie cases of intentional discrimination, retaliations and hostile work environment under ADEA, Title VII and WPA showing the nexus between the adverse actions and filing formal EEO discrimination complaints and participation in Whistleblowing activities clearly

established a causal connection shortly after Defendants learned of the protected activities. Plaintiff's strong prima facie cases and Defendants' pretexts unworthy of credence will permit reasonable factfinder to conclude unlawful discrimination against Plaintiffs. Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment.

**Issue 12. Defendants retaliated against Plaintiffs and denied directly funded work, excluded from managing projects, and did not assign Plaintiffs to positions of higher responsibility.**

Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law with regard to the following claims:

**Supporting Facts and Argument.**

1. From September to December 2001, Defendants discriminated and retaliated against Plaintiff Dr. Yuri Stoyanov changing his work assignment to escort duties in the toilet rooms of Bldg.15. ROI-02 p. 376, 216-217. Plaintiff was told to leave government work or to move to other departments/directorates. ROI-02 p. 217. Farley admitted that King and Davies instructed Farley to assign Yuri Stoyanov to escort construction workers in toilet rooms of Building 15 in 2001. See Ps' Ex. 27, SFD2 p. 57. King lied that he did not assign Dr. Yuri Stoyanov work incompatible with professional duties to escort construction workers in toilet rooms of Building 15 in 2001. JKD p. 90. Mr. Luna testified that he was surprised to see Dr. Yuri Stoyanov in Building 15 to "do that kind of work." See D's Ex. 17, ALD p. 16-19. Ms. S. Kurland identified humiliating assignment

and discrimination in her letter to Administrative Judge and explained that management retaliated against complainants using EEO process as another management tool against employees. See P's Ex. 27. Sharon Kurland letter.

2. Defendants denied Plaintiffs directly funded work in 6.2-program, and other programs. Ds'. Ex. 1 at ¶ 36, 38, 47; Ds'. Ex. 2 at ¶ 41; Ps' Ex. 26, ROI-03 p. 176-183. King lied that it was not his responsibility for allocation of funded work to employees in Code 74 prior to October of 2002. See Ps' Ex. 26, JKD2 p. 79, 88-89.

3. Defendants denied Plaintiff positions of higher responsibility. Mr. King intentionally discriminated against Plaintiffs and denied career ladder opportunities by assigning significantly younger employees to career ladder management positions to deny Plaintiffs promotions and opportunity to reach true potential at the agency. Ds'. Ex. 1 at ¶ 39, Ds'. Ex. 2 at ¶ 38. King admitted: "I didn't assign them to anything." Ps' Ex. 11, JKD2 p. 84-85. Defendants intentionally denied Plaintiff Dr. Y. Stoyanov position of higher responsibility and funded work as group leader of emerging technologies. See Ds'. Ex. 2 at ¶ 39; Ps' Ex. 25, ROI-02 p. 486. ROI-03 p. 177. King in conspiracy with subordinates intentionally escalated discrimination, isolated and excluded Plaintiffs from managing projects and positions of higher responsibility controlled by King in Code 74, and denied Plaintiffs directly funded work to aggravate harassment and to deny Plaintiffs incentive pay demo points. Ds'. Ex. 1 at ¶ 38; Ps' Ex. 20, ROI-03 p. 134-136, Ps' Ex 15, ROI-03 p 29-31, 143-193, ROI-02 p 182-183, 156, 16, YSD p. 238. Position of higher responsibility was assigned to

Plaintiffs only when the projects were disastrously failing (Komodo, LMS, SHF Antennas) and there was need for knowledge of the technology and leadership in management. See Statement of Facts at ¶ 6), JDD p. 78, WBD p. 38-39, ROI-03 p. 11; Ds'. Ex. 1, at ¶ 21-23, 45; D's Ex. 12, JKD p. 38.

4. Since November 2001, Defendants provided work on direct funding to the new employees, for example, Mirotznik, Smith, Stratton with inferior qualifications while at the same time denied such work to the Plaintiffs. ROI-02 p. 164-165. Defendants secretly and without vacancy announcement hired significantly younger Mr. M. Mirotznik with inferior qualification and provided him hourly salary higher than Plaintiff's salary. Ds'. Ex. 2, at ¶ 30.

5. Plaintiffs were replaced by someone outside the protected class and were denied directly funded work. Defendants hired Jerry Smith Jr. (American; DOB: 1/22/1973), Mark Mirotznick (American; DOB: 9/4/1965) and Joseph Stratton (American; DOB: 7/14/76) to replace Plaintiffs in the RF Technology Code 741. King deliberately treated Plaintiffs disparately and intentionally denied Plaintiffs directly funded work Plaintiffs could do on funded projects available in Code 74. YSD p. 222-223, 237-238, 242-243. ROI-02 p., ROI–02 p 153-166, 210, 212, 178-190. ASD p. 253, 257, 261-263; P's Ex. 33, HT p. 291, 295, 292, 300. Code 74 received $ 9.6 M in FY01 and received $ 14.6M in FY02. P's Ex. 42 Attachments # 18 and 19. King and Farley lied that they did not control which employees received directly funded work and directly contradicted facts and Plaintiffs testimony. See Ds'. Ex. 1, at ¶ 61. See

also Ds' Ex 17, ALD p. 11; Ps' Ex. 22, ROI-03 p. 171-182.

Plaintiffs established the pattern and practice of continuous discrimination and retaliations for opposing discrimination against Plaintiffs when Defendants intentionally denied Plaintiffs directly funded work, excluded from managing projects, and assignments to positions of higher responsibility. Plaintiffs clearly established strong *prima facie* cases of retaliations, disparate treatment, and hostile work environment under ADEA and Title VII. Plaintiffs' affirmative evidence of disparate treatment and discrimination is sufficient, when specific employment practices are isolated, identified, and combined with evidence. See *Smith v. City of Jackson*, 544 U.S. 228 (2005). It was improper for the District Court not to consider evidence establishing such a pattern and practice of continuous discrimination and retaliations against Plaintiffs for opposing discrimination. See e.g., *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir.1997) (concluding that the cumulative effect revealed a pattern of antagonism, which overcame any doubts raised by the temporal separation of events.) The material facts created jury questions; however, Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law. Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment.

**Issue 13. Defendants retaliated against Plaintiffs and denied incentive pay demo points.**

Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law with regard to the following claims:

**Supporting Facts and Argument.**

1. Mr. King failed to reply and lied to the EEO Counselor about Plaintiff Dr. Yuri Stoyanov' 12/21/01 appeal of denied incentive pay demo points and request to stop discrimination. ROI-02 p. 48, 540, yet on January 3, 2002, King sent via Ms. K. Schulin copy of transcripts of the 4/26/01 meeting, ROI-02 p. 529 that was requested in the 12/21/01 appeal of denied incentive pay demo points. See Ps' Ex. 20, ROI-02 p. 504, 505-508,

2. On January 2, 2002, Mr. King denied Plaintiff Dr. A. Stoyanov's appeal for incentive pay demo points, ROI-03 p. 38, 55, 54.

In the 7/25/06 Memorandum of Opinion on page 16, Judge Bennett made clearly erroneous decision and misapprehended Plaintiffs claims with regard to the incentive pay demo points stating: "In 'FY2000,' Davies and Farley discriminated against Y. Stoyanov by denying him 'incentive pay demo points....' (Y. Compl. ¶¶ 54 & 84.19)" and dismissed claim of denied incentive pay as untimely, contrary to the fact that Plaintiff also claimed denial of incentive pay for FY2001 (see ¶ 84.19) that was timely because Mr. King failed to reply and lied to the EEO Counselor about complainant's appeal of 12/21/01 to reconsider denial of incentive pay demo points and the request to stop discrimination. In addition, Plaintiff also stated the claim: "for denied pay demo points in FY2001" in ¶ 56 of the complaint. Furthermore, Judge Bennett abused discretion and denied Plaintiffs' motions to amend complaints. See order (paper #66). Plaintiff A. Stoyanov specifically added claim for incentive pay when King denied Plaintiff's appeal on 1/2/02, See A. Compl. ¶ 85.4. Consequently, Judge Bennett made

clearly erroneous finding of the material facts and law; Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment.

**Issue 14. Defendants intentionally discriminated and retaliated against Plaintiff by denying purchase of computer, travel, and deliberately interfered with Plaintiff's work.**

Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law with regard to claims of Defendants' intentional discrimination and retaliations against Plaintiff by denying purchase of computer, travel, and deliberate interference with Plaintiff's work:

**Supporting Facts and Argument.**

1. In May 2002, Defendants retaliated against Plaintiffs for participation in EEO activities by interfering with Plaintiffs' project ordering to use 6.1 project funds. ROI-03 p. 71-73, 79, 419-420) ASD p. 308-310. Farley interfered with Plaintiff's 6.1 project, fraudulently changed Plaintiff's time card, and overcharged 6.1 project in an attempt to sabotage success of the 6.1 ILIR project, ROI p. 418, ASD 302.

2. On May 20, 2002, Plaintiff was denied purchase of a personal computer. ROI-03 p. 73, 419, ASD 308-309. Farley admitted that he would buy a new computer "to bury the hatchet", ROI-03 p. 74. 74, King lied that he was not aware that Farley would buy Plaintiff a new computer, ROI-03 p. 75. Farley lied that he did not talk to Defendant King about buying new computer for Plaintiff, SFD p. 107. During the EEOC hearing Defendant King admitted that Farley informed him about buying Plaintiff new

computer; P's Ex. 3 HT 449-451. Caron conspired with King and Farley to commit perjury, HT p. 166, 197, 349-350. During the EEOC hearing Farley was found not credible and intentionally retaliating against Plaintiff because of Plaintiff's participation in EEO discrimination complaint activity. Ps' Ex. 36, See EEOC Bench Decision. Plaintiff was treated disparately. ROI-03 p. 419, ASD 308-309, HT p. 163, 743.

3. In June 2002, Defendants intentionally denied Plaintiff travel to the IEEE Symposium in retaliation for participation in EEO activities and Whistleblowing activities. ROI-03 p. 82-83, Ds'. Ex. 2 at ¶ 49.

Plaintiff established strong *prima facie* cases of discrimination and retaliations under ADEA and Title VII. The causal connection between the adverse actions and the protected EEO activities was clearly established when Plaintiff amended formal EEO discrimination complaint and added additional claims of intentional discrimination and retaliations for participation in EEO activity on April 30, 2002. ROI-03 p. 18. In addition, Plaintiff's brother sent appeal to the Commander of the agency about retaliations and fraud on April 26, 2002. ROI-02 p. 385, 390, 30-32. DCD p. 33-34. Defendants retaliated for Plaintiffs' participation in Whistleblowing activities. Caron conspired with King and Farley to commit perjury and during the EEOC hearing Farley was found not credible. On September 16, 2003, the EEOC Administrative Judge issued Decision finding[9] intentional discrimination against Plaintiff less than a week before agency officials escalated intentional

[9] Defendants' Exhibit 8, Order Entering Judgment.

discrimination against Plaintiff and unlawfully removed Plaintiff from the Scientist position on fabricated charges[10] effective November 18, 2003. The cumulative effect of numerous circumstances of discriminatory and retaliatory animus was evident throughout the entire course of events and revealed a pattern of antagonism, which overcame any doubts of intentional discrimination and retaliations. However, Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law granting Defendants Motion for Summary Judgment contrary to the direct evidence of found intentional retaliation during administrative processing of the Plaintiffs' EEO discrimination complaint. Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment.

**Issue 15. Violations of Whistleblower Protection Act.**

Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law with regard to the claims of retaliations for Plaintiffs' whistleblowing activities.

**Supporting Facts and Argument.**

1. On April 26, 2002, Plaintiff Dr. Yuri Stoyanov sent appeal to the Commander of the agency about retaliations and fraud by Mr. King with regard to transfer to another technology department. See ROI-02 p. 385, 390, 30-32.

2. Plaintiff also made disclosure of prohibited personnel practice to the Office of Special Counsel

[10] Case Civil Action No.: RDB 05-2819 pending adjudication.

(OSC) in June 2002 and agency administration through the chain of command. Ds'. Ex. 2 at ¶ 49.

3. Plaintiff Dr. Aleksandr Stoyanov made disclosure of prohibited personnel practice to the agency administration through the chain of command. Ds'. Ex. 1 at ¶ 61.10.

Defendants retaliated against Plaintiffs for participation in whistleblowing activities. The facts identified above clearly establish Plaintiffs' participation in whistleblowing activities because "[t]he disclosure [must] evidence an intent to raise an issue with a higher authority who is in a position to correct the alleged wrongdoing." *Hooven-Lewis v. Caldera*, 249 F.3d 259, 276 (4th Cir. 2001). During the hearing on Motion for Sumary Judgment on August 8, 2007, Plaintiffs explained that amended complaint included claims of retaliation under the Whistleblower Protection Act (WPA) that were filed with the EEO Commission. See the 8/15/07 Transcript of Motion for Summary Judgment p. 16-17, 20-21. Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law because the facts establish Plaintiffs' participation in Whistleblowing activities and raised the issue of violations of laws with a higher authority to correct the violations of Plaintiffs' rights. Consequently, Plaintiffs appeal and respectfully request to reverse District Court's Order and Judgment with regard to the claims of retaliations for Plaintiffs' whistleblowing activities.

**Issue 16. Issues related to conduct of these cases.**

As a result of abuse of discretion, Judge Bennett issued arbitrary decisions unsupported by substantial evidence and without procedures required by law, rule, or

regulation. Plaintiffs were harmed and denied jury trial because Judge Bennett fragmented claims and made piecemeal rulings and decisions depriving both Plaintiffs of fair hearing first dismissing crucial evidence in claims (age discrimination and discrimination on bases of national origin), denying full discovery and dismissing all Plaintiffs' claims against the individual Defendants in 2006. (paper #37). On August 15, 2007, Judge Bennett again abused discretion granting Defendants' Motion For Judgment on Pleadings with deliberate misrepresentations on the remaining claims. (paper # 107). In addition, Plaintiffs filed Motion for Additional Findings with request to issue decision on the whole case, pursuant to the Federal Rules of Civil Procedure 54 b) because of piecemeal erroneous decisions unlawfully deprived Plaintiffs of fair judgment on all claims. Judge Bennett abused discretion and on September 4, 2007 denied Plaintiffs Motion (paper # 109).

Plaintiffs objected to the "piecemeal disposal" of the Plaintiffs' complaints because of injustice of a fragmented judgment of the claims in the entire case. The evidence identified in the Plaintiffs' Oppositions to Defendants' Motions for Judgment and case laws presented by Plaintiffs were sufficient to permit the Court to infer that Defendants were dissembling to cover up discriminatory intent and a pattern of continuous intentional discrimination on bases of age, national origin, and in reprisal for opposing discrimination and participation in EEO discrimination complaint activities and Whistleblowing activities in addition to depriving Plaintiffs' of rights guaranteed by the Constitution and laws. Judge Bennett abused discretion and denied Plaintiffs motions for sanctions because of Defendants' representative Mr. Sippel abused his position, made

misrepresentations, violated discovery rules, and harmed Plaintiffs. Instead of searching for truth, Mr. Sippel deliberately misrepresented facts in Defendants' submissions and Judge Bennett made decisions in favor of the Defendants as a result of abuse of discretion and Defendants' deliberate misrepresentations.

On 9/7/05 Plaintiffs had to file Motion to Compel Defendant's Representative Mr. Sippel to Certify Under Penalty of Perjury the Content of his submissions to the Court because of Mr. Sippel's deliberate misrepresentations, [paper # 15]. On 9/29/05, Judge Bennett abused discretion and denied Plaintiffs' Motion to Compel Defendant's Representative to Certify Under Penalty of Perjury the Content of his submissions to the Court.[paper # 20]. As a result of denial of the Motion Mr. Sippel continued to escalate the abuse of the position of Defendants' representative to deliberately misrepresent facts in Defendants' filings and at hearings to obstruct justice and to harm Plaintiffs. On 9/30/05 Plaintiff filed Motion for Entry of Default Judgment [paper 21]. Plaintiffs were also burdened to file rebuttals because Judge Bennett denied Plaintiff's motions to compel Mr. Sippel to Certify Under Penalty of Perjury the Content of Defendants' Correspondence. [See papers 19, 30]. On January 27, 2006, Plaintiffs had to file Rebuttal [paper 35], of Defendants' Reply Memorandum of 1/24/06, [paper 34].

On August 15, 2006, Plaintiffs were denied requests for extension of time to decide length of time for limited discovery. (see transcript of August 15, 2006 teleconference; pp. 28-29). During the limited discovery Defendants intentionally obstructed depositions and denied Plaintiffs' requests for information and documents reasonably calculated to lead to the discovery of

admissible evidence. Mr. Sippel intentionally obstructed the deposition of Mr. Caron by violating rules of conduct during deposition with long, unnecessary, and repetitive objections intentionally wasting the 90 minutes time limit imposed by Judge Bennett. (see 11/7/06 Transcript of Motions Hearing, pp. 52-54; Motions for Sanctions, papers # 65, # 70 and # 71; Status Report, paper # 83). Mr. Sippel obstructed depositions, failed to timely respond to interrogatories and requests for documents. Judge Bennett abused discretion and failed to impose sanctions against Defendants for violating discovery rules. Plaintiffs request to carefully consider Defendants' responses to interrogatories and requests for documents were also denied (see 11/7/06 Transcript of Motions Hearing, pp. 73, 76, 80-82, 94-95, 100-101).

During the hearing on 11/7/06, Judge Bennett made contradictory orders to intimidate Plaintiff; see for example 11/7/06 Transcript of Motions Hearing; pp. 78-79, 88. (Plaintiffs ordered the 11/7/06 Transcript of hearing, but delivery of the Transcript was delayed. After receiving the transcript, Plaintiffs suspected that the 11/7/06 Transcript was modified; Plaintiffs requested audiotapes to clearly identify instances of tempering; however, Judge Bennett abused discretion and denied Motion to Compel production of November 7, 2006 audiotapes, paper # 85. Plaintiffs believe that the 11/7/06 Transcript of Motions Hearing is not true representation of the hearing on November 7, 2006. Plaintiffs raise this issue of tempering with the transcripts and appeal to order production of the November 7, 2006 audiotapes.)

After limited discovery, the record has not been adequately developed (see paper # 83). Judge Bennett abused discretion and made clearly erroneous interpretation of material facts and law failing to deny Defendants' motion for summary judgment because "A

summary judgment motion is expressly qualified by Rule 56(f)'s requirement that summary judgment be refused where the non-moving party has not had the opportunity to 'discover information that is essential to his opposition.'" *Strag v. Board of Trustees, 55 F.3d 943, 953 (4th Cir. 1995).* During the hearing on the motion for summary on August 8, 2007, Judge Bennett abused discretion, continuously interrupted Plaintiffs and denied fair hearing. See 8/8/07 Transcript of Motion for Summary Judgment hearing, pp. 51, 54-55, 57-59, 61-62, 67-68, 79. It was clear during the hearings that Judge Bennett was biased and not evenhanded.

4. Relief Requested

> What do you want the Count of Appeals to do? Identify exactly the relief you seek.

Plaintiffs appeal and respectfully request to reverse, vacate, and remand District Court's Order and Judgment with regard to:

Issue 1. Direct evidence of age discrimination and claims of intentional discrimination because of Plaintiffs' age.

Issue 2. Direct evidence of discrimination on bases of national origin and claims of intentional discrimination because of Plaintiffs' national origin.

Issue 3. Intentional Discrimination for Denied Promotion to Branch Head and claims of intentional discrimination on bases of age, national origin, and retaliation for opposing discrimination.

Issue 4. Discrimination by denying assignment to acting Branch Head Position and claims of intentional discrimination on bases of age and national origin.

Issue 5. Defendants Unlawfully Deprived Plaintiffs of Constitutional rights in Violation of Federal Laws and claims against individual Defendants, Jebsen, King, Davies, Farley, and Caron for violations of laws and regulations (including federal laws 5 U.S.C §2302-2301), fraud and deliberate misrepresentations, conspiracy, obstruction of official process, abuse of authority, abuse of administrative power, malicious abuse of process, intentional infliction of emotional distress, aiding and abetting violations of civil rights laws, violations of human rights laws, and perjuries in addition to violations of ADEA, Title VII, WPA, and Plaintiffs' constitutional rights.

Issue 6. Discrimination by Fraudulent Promotions Under "Accretion of Duty" and by hiding vacancy announcements and claims of intentional discrimination on bases of age and national origin for denied promotions, and disparate impact claims.

Issue 7. Denied Promotion to Chief Scientist Position and claims of intentional discrimination on bases of age, national origin and retaliation for prior EEO activities.

Issue 8. Violations of ADEA and Title VII antiretaliation Provisions for Denied Promotions and claims of intentional discrimination on bases of retaliation.

Issue 9. On February 21, 2002, Defendants Retaliated by Changing Plaintiffs' Work Schedule and claims of retaliations.

Issue 10. Defendants intentionally discriminated and retaliated against Plaintiff Dr. Yuri Stoyanov by transferring Plaintiff involuntarily to different technology department and claims of intentional

discrimination on bases of age, national origin and retaliation.

Issue 11. Defendants retaliated against Plaintiffs by assigning tasks incompatible with professional duties, using threats with disciplinary action, redirecting funding, denying transfer and claims of intentional discrimination on bases of age, national origin and retaliation for participation in prior EEO activities and Whistleblowing activities.

Issue 12. Defendants retaliated against Plaintiffs and denied directly funded work, excluded from managing projects, and did not assign Plaintiffs to positions of higher responsibility and claims of intentional discrimination on bases of age, national origin, retaliation for opposing discrimination and disparate impact claims.

Issue 13. Defendants retaliated against Plaintiffs and denied incentive demo pay points and claims of intentional retaliation for opposing discrimination.

Issue 14. Defendants intentionally discriminated and retaliated against Plaintiff by denying purchase of computer, travel, and deliberately interfered with Plaintiff's work and claims of intentional discrimination on bases of age, national origin and retaliation for participation in prior EEO activities.

Issue 15. Violations of Whistleblower Protection Act and claims of intentional retaliation for Whistleblowing activities.

Issue 16. Issues related to conduct of these cases.

And grant relief to each Plaintiff.

5. **Prior Appeals (for appellants only)**

A. Have you filed other appeals in this court?

No

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

Signature

[Notarization Not Required]

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

Aleksandr J. Stoyanov, Yuri J. Stoyanov
Complainants,

v.

Gordon R. England,
Secretary,
Department of the Navy,
Agency

Appeal Nos. 01A40609, 01A40640
Agency Nos . DON-02-00167-003, DON-02-00167-002
Hearing Nos . 120-2003-00020X , 120-2003-00031X

## DECISION

Complainants timely initiated appeals from the . agency ' s final order concerning their equal employment opportunity (EEO) complaints of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VU), as amended 42

U$_t$. S.C. § 2000e *et seq.* and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.* The appeals are accepted pursuant to 29 C.F.R. § *1614.405*. For the following reasons, the Commission AFFIRMS the agency ' s final order.

The record reveals that complainants, ND-4 Physicists at the agency ' s Naval Surface Warfare Center at the Carderock Division in Bethesda, Maryland, filed formal EEO complaints on March 19 , 2002 (amended April 30, 2002 and June 13 , 2002), alleging that the agency discriminated against them on the bases ofnationai origin (Russian), age (D.O.B. April 7, 1955), and in reprisal for prior EEO activity (arising under Title VII and the ADEA).

The issues for Aleksandr J. Stoyanov (Cl), are as follows :

(1) On February 4, 2002, the agency failed to promote him to the branch head position, ND 5, of the radar frequency (RF) technology branch, Code 741);

(2) In April 2000, the agency denied him reassignment as acting branch head in the RF technology branch, code 741;

(3) Beginning in September 2001, the agency denied him direct work;

(4) The agency denied him positions of higher responsibility with regard to the individuals listed on ROI 1, page 190, among others;

*(5)* On April 11, 2002, his first level supervisor (S1) assigned him a task Cl believed was incompatible with his professional duties;

(6) On February 29, 2002, the agency changed his work schedule and denied him an exception to the

"core hour" rule;

(7) In March 2002, management failed to promote him to the ND-5 position;

(8) In May 2002, the agency failed to reassign him to the chief scientist. Position;

(9) The agency did not provide him 6.2 program funding;

(10) On July 29, 2002, S1 required that C1 draft daily work summaries;

(11) On September 22, 2002, 51 requested that C1 carry out work that was incompatible with Cl's professional duties concerning test riding of a carriage and menial work such as pulling cables;

(12) In September 2002, his second level supervisor used threats of disciplinary action, repeatedly demanded information C1 did not have and threatened him with insubordination;

(13) On June 12, 2002, the agency denied him travel to the IEEE symposium;

(14) On May 20, 2002, the agency cancelled purchase of a personal computer; and

(15) On May 17, 2002, die agency directed C1 to use new 6.1 project funds for his salary instead of for planned publications and materials, thus mismanaging funding allocation and arbitrarily changing work.

The issues for Yuri J. Stoyanov (C2) are as follows:

(1) On February 4, 2002, failed promote him to the branch head position, ND-5 of the radar frequency (RF) technology branch, code 741;

(2) In April 2000, the agency failed to select C2 as acting branch head in the RF technology branch, code 741;

(3) The agency denied him directly funded work and positions of higher responsibility for the period of March 2001 to February 4, 2002;

(4) S2 failed to provide C2 with a copy of the notes from an April 26 , 2001 meeting;

*(5)* From September to December 200 1 , S2 changed CZ' s work assignment and location to Building 15 ;

(6) From February 4, 2002 to April 29, 2002, the agency denied C2 directly funded work and positions of higher responsibility for the period, as well as 6 2 program funding;

*(7)* On February 21, 2002 , the agency changed 2t ~ work schedule and on March 7, 002, the agency denied him an exception to the "core hour" rule;

(8) On April 29, 2002, the agency transferred C2 from the RF technology branch, code 741, to the structural acoustics and target strengths branch, code 722;

(9) In May 2002, the agency did not reassign C2 to the Chief Scientist position;

(10) In September 2002, the agency redirected funding of *$95* ,000 from C2; and

(11) In September 2002, the agency denied C2's request to transfer to code 741.

At the conclusion of the investigation, complainants requested a hearing before an EEOC Administrative Judge (AJ). On June 19, 2003 , upon a motion of the

agency, the AJ issued a preliminary bench decision dismissing all hut five claims (Cl's claims 5, 6, 10 and 14, and C2's claim 7). Following a hearing on these surviving claims, the AJ issued a final decision on August 14, 2003 , incorporating the conclusions of the bench decision, finding discrimination as to one issue – Cl's claim 14 - and finding no discrimination as to the other claims . On September 9, 2003, following a subsequent hearing on compensatory damages , the AJ awarded C1 $ 1,000 in non-pecuniary damages and a new office computer not to exceed $2 ,500 in addition to ordering the agency to post a notice to employees reaffirming its commitment to Title VII. In its final order dated October 30, 2003 the agency fully accepted the AJ' s decision and order.

Complainants appeal the final order. They argue that the AJ was partial and unfair, and as such they claim to be entitled to a ruling in their favor on all the issues they originally set forth. Specifically , complainants maintain that the AJ applied an incorrect standard in issuing his bench decision. They state that a summary disposition of the claims was improper because they presented evidence putting into question the credibility of agency witnesses which clearly indicated that genuine issues of material fact existed . They also argue that the AJ improperly fragmented their harassment claim, considering each claim separately and not as evidence of patterned treatment. Complainants further maintain that illicit events took place during the agency investigation and the hearing, namely that the evidence had been tampered, agency witnesses lied on the stand, and that the AJ misrepresented crucial facts in favor of the agency.[1]

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[1] Complainants also argue that the AJ failed to analyze their case

The agency, in turn, requests that we affirm its final order implementing the AJ's decision.

The Commission will not delve into the background facts in this matter. We find that the AJ adequately set forth the relevant facts. Instead, we will focus our attention on the issues raised by the complainants on appeal. The bench decision was properly incorporated into the final decision and as such there is only one AJ decision, hut, for the sake of clarity, we will separate and review each decision in our analysis here.

June 19,2003 Bench Decision

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in light of the U.S. Supreme Court decision in *Reeves* v. *Sandercon Plumbing Products, Inc.* 530 U.S . 1 33 (2000), which they interpret to mean that "the fact of advance age alone in the absence of any other • justification for adverse action - is sufficient" to make an age discrimination claim under the ADEA . *Appeals of C1 & C2.* We believe that complainants misinterpreted the Supreme Court holding. . It is true that when a complainant brings an ADEA claim the complainant need not provide direct evidence of the discrimination, and that advanced age, in the absence of any other justification for an adverse action is sufficient to prove the claim. However, Reeves still requires that where the employer brings forth a justification for its action , the complainant must prove by a preponderance of the evidence that the employer's justification is a pretext for discrimination. *See 530* U.S. at 143. As it applies to this matter, we find that the AJ applied the law of ADEA to the claims at issue here properly, as we agree that complainants failed to prove by a preponderance of the evi[illegible]nce that discrimination motivated the agency ' s actions.

Lastly , complainants argue that they were denied wrongfully the opportunity to present key ~ evidence. Complainants however are informed that once an AJ is appointed , he or she has full responsibility far the adjudication of the complaint *See MD-110* at 7.5 (citing 29 C.F.R. § 1614. 109(a)). It is within the discretion of the AJ to admit or deny evidence. *See Id.* We find no error in the AJ's decision here not to admit the evidence complainants claim was wrongfully denied.

The June 19, 2003 decision was essentially a decision without a hearing, which Commission regulations allow when an AJ finds that there is no genuine issue of material fact. *See* 29 C. F.R. § 16 14. 109(g); *see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614* (Nov . 9 , 1999) *(EEO MD- I 10)* at 7-14-i *5* . This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact, *See Anderson* v. *Liberty Lobby, Inc.* , 477 U. S . 242, *255* (1986). In ruling on a motion for summary judgment, a court s function is not to weigh the evidence but rather to determine whether there are genuine issues for trial . *See Id.* at 249. . The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party' s favor. *See id!.* at *255.* . An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party . *Celotex* v. *Catrett,* 477 U.S. 317, 322-23 (i986); *Oliver* v. *Digital Equip. Corp.,* 846 F.2d 103, *105* (1st Cir . 1988). A fact is "material if it has the Potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence the issuance of a decision without a hearing is not appropriate. Similarly, an AJ may not issue a decision without a hearing if he or she actually has to find facts first to do so.

The Commission finds that the issuance of a decision without a hearing here was appropriate and based on the correct legal standard. We find that the AJ's

decision properly summarized the relevant facts and referenced the appropriate regulations , policies , and laws . The AJ came to his conclusions because he found that complainants had not rebutted the agency's evidence, and thus, he found that with regard to the dismissed claims, no material facts were in dispute. Complainants take issue with this finding, arguing that they presented sufficient evidence to meet their burden, pointing particularly to explanations provided in the Pretext Statement on Management Testimony, dated October 7, 2003 (ROI at 142-193) . Complainants arc upset that the AJ failed to review this statement along with other evidence and concluded that complainants had not adequately proven that the agency's purported legitimate reasons for acting were pretextual. However, complainant's arguments on appeal are insufficient. They failed to provide concrete evidence, other than lengthy statements of belief and conjecture, that management in fact lied.

Specifically, with regard to Cl's claims 1-4, 7-9 and 15 and C2's claims l-3, 6 and 8-11, the AJ concluded that complainants established a *prima fade* case of age, national origin and reprisal discrimination.[2] However,

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[2] The AJ found that complainants had not established a *prima facie* case of discrimination in their non-selection claims relating to positions for which they never applied . We agree with this finding. Furthermore, the AJ found that C2 had not established a *prima facie* ease of discrimination as to claims *5* and 4 . With regard to claim *5* the allegation that S1 changed C2's work assignment and made C2 escort servicemen to Building I *5* bathrooms to fix the toilets — the Al found that *no prima facie* case had been made because similarly situated co-workers not in C2's protected classes and who were also on unplanned overhead were made to do the same thing. Moreover, the agency had a legitimate security concern in asking employees to escort the servicemen as Building 15 is a high security building. Secondly,

the AJ further determined that complainants did not establish that more likely than not, the agency s articulated reasons were a pretext to mask unlawful discrimination and retaliation . Contrary to complainants ' assertions , we find that the AJ's decision. was well-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party' s favor. *See id* at *255.* . An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party . *Celotex* V. *Catreit,*477 U.S. 317, 322-23 (1986); *Oliver* v. *Digital Equip. Corp.* , 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, the issuance of a decision without a hearing is not appropriate. Similarly, an AJ may not issue a decision without a hearing if he or she actually has to find facts first to do so.

The Commission finds that the issuance of a decision without a hearing here was appropriate and based on the correct legal standard. We find that the AJ' s decision properly summarized the relevant facts and referenced the appropriate regulations, policies, and laws. The AJ came to his conclusions because he found that complainants had not rebutted the agency's evidence, and thus, he found that with regard to the dismissed claims, no material facts were in dispute.

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as to C2's claim 4 alleging that S1 had discriminated against him in denying him copies of meeting notes, the AJ found, and we concur, that no evidence existed in the record to show that the notes were intentionally denied to C2. As such, there is insufficient evidence to draw an inference of discrimination or retaliation.

Complainants take issue with this finding, arguing that they presented sufficient evidence to meet their burden, pointing particularly to explanations provided in the Pretext Statement on Management Testimony, dated October 7, 2003 (ROl at 142- 193). Complainants are upset that the AJ failed to review this statement along with other evidence and concluded that complainants had not adequately proven that the agency's purported legitimate reasons for acting were pretextual. However, complainants's arguments on appeal are insufficient. They failed to provide concrete evidence, other than lengthy statements of belief and conjecture, that management in fact lied.

Specifically, with regard to Cl's claims 1-4, 7-9 and 15 and C2's claims 1-3, 6 and 8-1 1, the AJ concluded that complainants established a *prima facie* case of age, national origin and reprisal discrimination.[3] However, the AJ farther determined that complainants did not establish that more likely than not, the agency ' s articulated reasons were a pretext to mask unlawful discrimination and retaliation. Contrary to complainants' assertions, we find that the AJ's decision was well-reasoned, thoughtful and legally sufficient. Complainants are reminded that the AJ is an impartial third party in this matter and we find no evidence of bias to prove the contrary.[3]

The record shows that complainants, although highly trained, experienced and professionally recognized,

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[3] Complainants allege that both the AJ, the court reporter, and the EEO Counselor tainted the EEO process and denied them a fair trial by "colluding with the agency" and tampering with witness testimony and investigation reports. *C2 Appeal* at 2-3 . We find these claims to be entirely ungrounded, and the evidence put forth by complainants is insufficient to sustain the allegations.

have had problems in the workplace unrelated to their age, national origin or protected activity. The record indicates that complainants are unable to produce timely projects, cannot maintain the projects within budget, do not work well with others, and are unwillingly to expand their understanding of how their day-to-day work relates to Navy operations in general. . The agency explained that the people they chose for the positions were simply better able to handle managerial tasks than complainants Complainants, in turn, argue that their qualifications are plainly superior to the selectees. . However, we note that the positions were not just technical posts but rather supervisory posts. More than technical experience was necessary, strong interpersonal and leadership abilities were needed too.. Given the evidence in the record regarding complainants' problems of meeting project deadlines, managing project funds and working well with co-workers and sponsors, we find that the agency's decision to not select complainants to the various positions of higher responsibility was legitimate and non-discriminatory.

On appeal, complainants make accusations that agency management lied, which in turn they insist is proof that the agency ' s reasons are illegitimate and pretextual . However , as mentiQned above, complainants fail to show by a preponderance of evidence that the agency lied about the justifications for its actions. Given the lack of evidence of discrimination, the Commission will not stand in judgment as to whom the agency should and should not hire . The agency has broad discretion to set policies and carry out personnel decisions , and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. *See Texas' Dep*

*'t qf Community* Affairs *v. Burdine,* 450 U.S. 248, 259; Vanek v. *Dep 't qf the Treasuiy,* EEOC Request No. 05940906 (Jan. 16, 1997).

The Commission also would like to address complainants' concern that their claims were fragmented improperly . Improper fragmentation occurs at the processing stage of the complaint, when an agency breaks up a claim by failing to distinguish between the *claim* the complainant is raising and the *evidence/incidents* he or she is offering in support of that claim. *See EEO MD-I 10,* at *5-5* . This happens frequently when a complainant raises a claim of harassment and alleges specific incidents of harassment as evidence of the claim. Fragmentation did not occur here. The agency grouped C s allegations of harassment as such, and the AJ viewed these incidents as support of claims of harassment in his bench decision. *See Bench Decision* at 56-73.

We must note that an agency is always liable for a supervisor's harassment if it culminates in a tangible employment action. *See EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors,* at IV.A-B (June 1 8 , 1999) . An actionable claim of harassment requires that the supervisor's conduct towards the employee result in a significant *change* in the employee's employment status ~ *See WI.* (citing *Burlington Indus. , Inc. v. Ellerth,* 118 *S.Ct.* 2257, 2268 (1998); *Faragher* v. *City of Roca Raton,* 118 S.Ct. 2275, 2284 (1998)). Complainants argue that the AJ erred in considering each harassment claim separately and not as evidence of patterned treatment.

Complainants are in error . The agency framed complainant' s allegations as a claim of harassment —

no fragmentation occurred. Once the claim reached the AJ, it was his responsibility to look at the individual incidents allegedly proving harassment to evaluate the merits of the whole claim. Iii other words, it was proper for the AJ to separate the alleged individual incidents to determine whether the incidents are indeed proof of harassment. Therefore, we find no error in the AJ's analysis of complainants' harassment claims.

August 14, 2003 Decision

As mentioned above, the AJ incorporated the earlier bench decision into his final decision on the matter. Five incidents of complainants' harassment claims survived. to this stage *(Cl* ' s claims 5, 6, 10 and 14 and C2's claim 7).

Pursuant to 29 C . F . R. § 16 1 4 .405(a) , all post-hearing factual findings by an Administrative Judge will he upheld if supported by substantial evidence in the record. Substantial evidence is defined as " such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. " *Universal Camera Corp.* v. *Nat'l Labor Relations Bd.* , 340 U.S. 474, 477 (1951) (citation omitted) . A finding regarding whether or not discriminatory intent existed is a factual finding. *See Pullman-Standard Co.* v. *Swint, 456* U .S. 273 , 293 (1982), An AJ's conclusions of law are subject to a *de novo* standard of review, whether or not a hearing was held.

The AJ heard witness testimony and therefore had a first hand opportunity to evaluate witness credibility. The Commission, on the other hand, hears no evidence; therefore, greater weight is placed on the AT's findings after a hearing than when an AT issues a decision without a hearing. On a whole, we find that

the AJ's decision was well-reasoned and displayed a thorough understanding and analysis of the evidence on the record. As such, we fin.d that substantial evidence supports the AJ's finding of no discrimination.

Complainants disagree on appeal, attacking the credibility of the evidence on the record. However, disagreement alone, without concrete and substantial evidence to prove the contrary, is not enough to overturn a decision following a hearing.

We further hold that the AJ's finding of discrimination when Sl cancelled the purchase of a computer for Ci is supported by substantial evidence. Neither party disputes this finding. We would note that the record indicates that shortly prior to S1 granting C1 a new computer , *C*1 filed an EEO complaint against S1 alleging discrimination. A few days after S1 granted Cl the computer , *C* I wrote a scathing email to S2 alleging that S1 mishandled project funds and was an incompetent manager. The day after learning of the email S1 immediately cancelled the computer request. S1 admits to having been angered by C1' s email , and the Aj found that this anger coupled with S1's anger at him for filing an EEO complaint prompted Sl to cancel the computer request. The AJ stated , S1's "anger and his feelings about the EEO complaint were so intertwined that it is impossible to separate them. . . . [S1] would not have made the same decision even in the absence of discrimination." " *Decision* at 15[4] in a subsequent

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[4] We note that complainant raised the computer incident as evidence of harassment by his supervisor.. On its own, the incident is insufficient to support a harassment action. *See generally EEOC Enforcement Guidance on Vicarious Employer*

hearing, the AJ awarded C1 $1,000 in non-pecuniary damages and ordered the agency to purchase him a new computer. . Complainants do not have issue with this award, and the agency did not appeal.

After a review of the record in its entirety, including consideration of statements submitted on the appeals, the Commission affirms the final agency order because the AJ's ultimate findings of unlawful employment discrimination and his award of relief are supported by a preponderance of the record evidence. Additionally, we deny complainants further request for relief.

ORDER

The agency is ordered to take the following remedial action:

1. Within thirty (30) calendar days of the date this decision becomes final, the agency shall pay complainant Alexandr J. Stoyanov $ 1,000.00 in non-pecuniary compensatory damages.

2. Within thirty (30) calendar days of the date this decision becomes final, the agency shall provide complainant Alexandr J . Stoyanov with a personal computer not to exceed $2,500.00 fully capable of handling the software and work functions necessary to carry out complainant's job obligations.

3 . The agency shall take corrective, curative, and preventive actions to ensure that violations of Title VII and the ADEA will not recur, including, but

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*Liability for Unlawful Harassment by Supervisors* discussed *supra*. Nevertheless, , the AJ determined, and we agree, that the incident did state an independent disparate treatment claim involving the terms and conditions of complainant's employment upon which relief could be granted.

not limited to, providing four (4) hours of training with special emphasis on retaliation to the agency officials involved in the above mentioned complaint.

4. The agency shall consider taking appropriate disciplinary action against the responsible management officials.. The Commission does not consider training to be disciplinary action as noted above . The agency shall report its decision to the compliance officer. . If the agency decides to take disciplinary action, it shall identify the action taken. if the agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. In any of the responsible management officials have left the agency's employ, the agency shall furnish documentation of their departure date(s).

POSTING ORDER (G0900)

The agency is ordered to post at its Naval Surface Warfare Center, Carderock Division , in Bethesda, Maryland copies of the attached notice. Copies of the notice, after being signed by the agency ' 5 duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final , and shall remain posted for sixty (60) consecutive days, in conspicuous places , including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices arc not altered, defaced, or covered by any other material . The original signed notice is to he submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision, within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES. (H0900)

If complainant Alexandr J. Stoyanov has been represented by an attorney (as defined by 29 C.F.R. § 1614 . 501(e)(i)(iii)), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § I 614.501(c). The award of attorney's fees shall he paid by the agency. The attorney shall submit a verified statement of fees to the agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION' S DECISION (1(050 i)

Compliance with the Commission' s corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency ' 5 report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. if the agency does not comply with the Commission' s order, the complainant may petition the Commission for enforcement of the order . 29 C. F . R. § 1614.503(a). The complainant also has the right to file a civil action to enforce compliance with the Commission' s order prior to or following an administrative petition for enforcement. *See* 29 C,F.R. § 1614.407, 1614.408, and 29 CF.R. § ióí4.503(g). Alternatively, the complainant has the right to file a

civil action on the underlying complaint in accordance with die paragraph belowmentitled "Right to File A Civil Action. " 29 C.F.R. §~ 1614.407 and 1614.408. A civil action for enforcement or a ëivil action on the underlying complaint is subject to the deadline stated in 42 U . S. C . 2000e-16(c) (1994 & Supp. IV 1999). If the complainant files a civil, action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. *See* 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS -- ON APPEAL

RECONSIDERATION (M0701)

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within **thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405 ; Equal Employment Opportunity Management Directive forL29- C.F.R. Part 1614 (EEO MD- 1 10), 9-18 (November 9, 1999) All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity

Commission, P.O . Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any Supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. *See* 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (50900)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means tile national organization, and nol. the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot aliord the services of an attorney , you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees , costs , or other security . *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U .S.C. § 2000e *ci seq. ;* the Rehabilitation Act of 1973, as amended , 29 U . S . C . § § 79 1 , 794(c) . The **grant or denial of the request is within the sole discretion of the Court** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request arid the civil action must he filed within the time limits as stated in the paragraph above ('Right to File A Civil Action").

**FOR THE COMMISSION:**

Carlton M. Hadden, Director

Office of Federal Operations

Date: March 29, 2005

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C. 20507

NOTICE TO EMPLOYEES,

POSTED BY ORDER OF THE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

An Agency of the United States Government

This Notice is posted pursuant to an order by the United States Equal Employment Opportunity

Commission dated _____ which found that a violation of Title vii of the Civil Rights Act of 1964 (Title yrl), as amended, 42 U.S . C . § 2000e *et seq.* and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C . § 621 *et seq.* has occurred at the agency' s Naval Surface Warfare Center , Carderock Division, in Bethesda, Maryland (hereinafter this facility).

Federal law requires that there be no discrimination against any employee or applicant for employment because ofthe person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN. AGE, or DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

This facility was found to have retaliated against an employee for his prior EEO activity arising under Title VII and the ADEA. The facility was ordered to pay the employee $1,000 in nonpecuniary compensatory damages and provide the employee with a new personal computer. This facility will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all federal equal employment opportunity laws and will not retaliate against employees who file EEO complaints.

This facility will comply with federal law and will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, federal equal employment opportunity law.

Date Posted:

Posting Expires:

29 C.F.R. Part 1614

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## AFFIDAVIT

I, ALEKSANDR J. STOYANOV, declare the following to be true and correct:

1. I was at all material times employed as Scientist, ND-1310-4, by the Department of the Navy, Carderock Division, Naval Surface Warfare Center, Code 741, 9500 McArthur Boulevard, West Bethesda, MD 20817-5700, since 1989.

2. I was born in Russia on April 7, 1955. I am now 50 years old and I am the United States citizen.

3. On or about February 4, 2002, I filed first Equal Employment Opportunity ("EEO") discrimination complaint with the agency because of egregious unlawful discrimination against me on account of my national origin and age. Since that time agency officials had escalated intentional discrimination and retaliations.

4. I was forced to file additional EEO discrimination complaints of discrimination and retaliations that resulted in claims of intentional discrimination accepted by the agency EEO office.

5. The claims of intentional discrimination and unlawful retaliations against me for participation in protected EEO activity had been investigated and I timely requested a hearing by the EEO Commission ("EEOC").

6. After the EEOC hearing the agency was found to intentionally discriminate against me in unlawful reprisal for participation in EEO discrimination complaint activity. In March 2005, the EEO Commission Office of Federal Operations

("EEOC-OFO") notified my brother Dr. Yuri Stoyanov and me of my right to file a civil action against Gordon R. England, Secretary of the Navy who is the official agency head of the U.S. Department of the Navy.

7. From 1980 to 1986, I was working toward Ph. D. degree in Physics. I studied advanced physics and worked part-time as Research Associate at the Catholic University of America in Washington DC. In May 1986, I was awarded Doctorate degree in Physics.

8. From 1986 to 1988, I was employed by the Applied Research Corporation performing research for NASA Goddard Space Flight Center in electromagnetic and acoustic wave scattering and absorption.

9. From 1988 to 1989, I was Office of Naval Technology Postdoctoral Fellow at the Signatures and Countermeasures Branch of Ship Electromagnetic Signatures Department, Carderock Division Naval Surface Warfare Center.

10. On November 19, 1989, I began employment with the Department of the Navy, Carderock Division Naval Surface Warfare Center in the position of Scientist at the Radar Frequency (RF) Technology Branch, Code 741 of Ship Electromagnetic Signatures Department.

11. I received favorable performance evaluations and performed my job in superb manner receiving performance and service awards for outstanding service and exemplary performance.

12. I continuously worked in Ship Electromagnetic Signatures Department later renamed as Electromagnetic Signature Technology Department, Code 74. I worked in the same RF

Technology Branch, Code 741 together with my twin brother Dr. Yuri Stoyanov born in Russia on April 7, 1955.

13. From 1989 to 1995, Mr. M. Sekellick was my first level supervisor; and from 1995 to 2000, Mr. John Davies was my first level supervisor while Mr. King was the second level supervisor.

14. The pattern of continuous discrimination against me based on national origin and age became apparent to me when Mr. King appointed employees with inferior qualifications than my qualifications to positions of responsibility.

15. Mr. King expressed his preference to hire and promote significantly younger persons than his own age during staff meetings in 2000. I participated in staff meetings when I was acting Branch Head of Code 741. In fact, Mr. King sent email to members of the Code 74 staff that stated in part: "This is distressing. I am above the average age" of 44 years old, "There is real paucity of employees in the 26 to 36 year age bracket" and "...we need fresh ideas, skills, and enthusiastic energy that new employees bring." Mr. King's comments made obvious to me hostile attitude towards my brother Dr. Yuri Stoyanov and me because we are substantially of the same age as Mr. King. It was obvious that Mr. King was discriminating against us by intentionally denying funded work to force employees above 44 years out of Code 74.

16. Mr. King's position as the second level supervisor had allowed him to abuse his administrative power and, hiding behind first level supervisors, to deliberately and systematically deny

my brother and me equal employment opportunities and promotions.

17. Around 1995, my brother Dr. Yuri Stoyanov asked Mr. King to manage a special access project and at about the same time I wanted to buy a Toshiba computer to do the work, however Mr. King denied position to my brother and the purchase of computer. These incidents made me realize that Mr. King was biased and prejudiced toward any one or anything having any relationship with Russia, as detailed in my deposition; Aleksandr Stoyanov Deposition, AD p. 280-287. Mr. King knew that I was born in former Soviet Union (Russia). These incidents showed me that Mr. King's judgment was overwhelmed by his bias and discrimination against my brother and me because of our national origin when Mr. King excluded both my brother and me from participation in the largest programs in the department 74 such as Billy Goat and special access programs in spite of the fact that my brother and I were the best qualified to work on these projects. My brother and I were holding Top Secret security clearances since about 1990, which made us eligible to be "signed in" to work on special access program. I was never denied security clearance. Mr. King intentionally denied us participation with such programs when he made decisions who should be working on programs available in Code 74 including the special access programs. Additional denial of working on special access programs occurred around 1998, when Mr. Davies asked me to submit security Form 86 to be "signed in" to work on special access program, however Mr. King denied the assignment.

18. Mr. King intentionally denied me program manager positions on significant projects or programs available in Code 74, but appointed the least qualified

significantly younger employees. Mr. King denied me 6.2 program manager position, but appointed the least qualified significantly younger employee Mr. S. Russell in September 1998. Mr. King denied me program manager position on account of my national origin (born in Russia) and age (I was 43 years old at the time). I know that Mr. Russell with inferior qualifications had not worked in the Ship Electromagnetic Signature Technology prior to his appointment by Mr. King, nor Mr. Russell had specialized experience or education in the Electromagnetic Signature Technology or RF Technology.

19. At the time of the appointment, the 37-years old Mr. Russell (born in Virginia) was a new employee in the Ship Electromagnetic Signature Technology Department, Code 74 and significantly younger than I. Mr. Russell was far less qualified to be the program manager of the 6.2 applied research and development program in ship electromagnetic signature technology than I. Indeed, Mr. Russell had no experience in electromagnetic signature technology prior to being appointed by Mr. King. By contrast, I had more than 15 years of broad based research experience in electromagnetic technology and management experience.

20. Mr. King intentionally denied me positions of responsibility and projects of any significance to deny me promotion and opportunity to reach my true potential at the agency because of my national origin and age.

21. In or around 1997, Mr. King intentionally denied me leadership position in a million dollar project Komodo, but assigned unqualified younger

employee (Mr. Dirlick). Mr. King intentionally discriminated against me denying me positions of leadership from the beginning of the project.

22. Only when it became apparent that project Komodo was going to fail due to Mr. Dirlick's lack of qualifications, Mr. King assigned me the responsibility for the project. I successfully accomplished the Komodo project due to my knowledge, skills, experience, and leadership abilities.

23. Mr. King intentionally denied me career ladder opportunities because of my age and national origin. Mr. King deliberately denied positions of responsibility and projects of any significance because of his bias and discrimination against me when Ms. Dela Cruse with no experience, knowledge, or ability was appointed as the task leader of the LMS advanced technology demonstration project in or around 1998, while I was assigned only a small task in the LMS project. Ms. Dela Cruse (DOB12/2/69) was significantly younger than I and she did not have knowledge nor experience to lead the signature tasks, but was given the position of the task leader to deny me the assignment. About April 1999, my LMS task was completed and I was assigned insignificant task unrelated to the LMS project. When it became apparent that the LMS project would fail, Mr. King assigned me to work on the LMS project again. I was assigned responsibility for the LMS signature analyses tasks and the RCS (Radar Cross Section) measurements of the LMS since April 2000. I worked in cooperation with my brother Dr. Yuri Stoyanov on developing alternatives to save the LMS project from imminent failure.

24. In December of 1999, with the reorganization of the Signatures Directorate, Code 70 and the Electromagnetic Signatures department, Code 74, Mr. King created vacancy of the branch head position in the Radio Frequency Technology branch, Code 741. I asked Mr. King to be the Brach Head of Code 741. Mr. King temporarily assigned me to the acting branch head position (for 3 month, from January 1, 2000 to March 31, 2000). I successfully performed Branch Head duties, and in fact, Mr. King admitted that I "have done a fine job." Mr. King was well aware that he denied my brother and me career ladder opportunities and intentionally discriminated against us. I was given the 3-month temporary assignment only because Mr. Farley was on assignment at shipyard in Main.

25. Mr. King intentionally discriminated against me by denying me appointment as permanent Branch Head of Code 741. Instead, Mr. King assigned junior engineer Mr. Farley as the acting branch head to the RF Technology branch on April 1, 2000, for the duration of 22 months. Around that time Mr. King talked that there was paucity of employees in the 26 to 36 year age bracket and I knew that he wanted to hire and promote younger employees. Mr. King was distressed because he was above average age of 44 - clearly implying that I was too old for the job.

26. The assignment of the 30-year-old Mr. Farley to the acting branch head position in was to deny me promotion (I was 45 years-old). It was obvious to me that Mr. King discriminated against my brother and me on account of my age and national origin.

27. Mr. King was acting Head of Code 70 intermittently since January 2000 until June 2002. As

Head of Code 70, Mr. King discriminated against me denying promotions and assignments leading to promotion.

28. Later I learned that Mr. King manipulated selection process hiding fraudulent promotions and secretly promoting employees with inferior qualifications to cover up discrimination against my brother Dr. Y. Stoyanov and me the only two Russian born employees in Code 70.

29. My brother and I corroborated Mr. King's intentional discrimination against us as evident by considering the pattern of fraudulent promotions in the Directorate (Code 70) and the Department (Code 74) of Mr. G. Miller, Mr. W. Stephens, Mr. D. Vinh, Mr. S. Russell, Mr. J. Young, Mr. R. Renfro, Mr. W. Nichols, Mr. D. Mayo, Mr. P. Honke, Mr. K. Wilson, who were promoted fraudulently and secretly without any vacancy announcement or by manipulating selection process and hiding vacancy announcements.

30. During the OCI investigation in August 2002, my brother and I have learned that these employees were promoted secretly under pretext of "accretion of duty" to cover-up discrimination and fraud with promotion of employees with inferior qualifications to high-grade ND-5 (GS14-GS15) positions without any vacancy announcements. After further investigation my brother and I learned that vacancy announcements for ND-5 position were prepared for Mr. Young and Mr. Honke, but not advertised in the Directorate Code 70 to hide opened positions as part of continuous discrimination against my brother and me to deny us opportunity for promotion and in reprisal for filing EEO complaint. To cover-up reprisal and fraud with promotion of Mr.

Young, my brother's and my Job series 1310-Physicist was intentionally excluded from the vacancy announcement CAR 02-0045 where only one job series was listed. The vacancy announcement was only for 1 week and specifically tailored for Mr. Young using only his job series 0861, which was irrelevant to the duties of the position. Similar fraud was committed by Mr. King, Mr. Davies and other agency officials promoting Mr. Honke and other employees identified in subsequent EEOC cases. The pattern of fraud with promotions and assignments evidence continuous discrimination against me on account of my national origin and my age as the only factors considered by Mr. King when he denied promotion to my brother Dr. Yuri Stoyanov and me.

31. Mr. King discriminated against my brother and me when he assigned fraudulently Mr. Farley to the acting Branch Head of Code 741 for 22 months. I know that, Mr. Farley, unlike my brother and I, had very little experience in electromagnetic signature technology and never worked in the RF Technology branch Code 741 prior to his assignment. Mr. Farley worked in the department as a junior engineer detailed to other organization, and did not posses knowledge nor had experience in the RF Technology to be acting Branch Head of Code 741. Mr. Farley had only BS degree in mechanical engineering since 1991. By contrast, my brother Dr. Yuri Stoyanov and I had advanced Ph. D. degree in physics since 1986, and had been experts in the radar/electromagnetic and acoustic technologies. It was obvious that Mr. Farley was far less qualified to be the Branch Head of code 741, than my brother Dr. Yuri Stoyanov or I.

32. Not long after Mr. King assigned Mr. Farley to the acting Branch Head position of Code 741

position, my brother Dr. Yuri Stoyanov opposed obvious discrimination by asking Mr. King why he discriminated against him and did not assign him to be acting Branch Head.

33. As a result of opposing obvious discrimination, Mr. King and Mr. Farley started interfering with my work and projects. Mr. Farley called meetings to discuss the work status but was incompetent to understand phenomenology of radar measurements at near and far ranges. My brother Dr. Y. Stoyanov and I were working on the LMS project since April 2000. Earlier, my brother and I worked on 6.2 research leading to the LMS advanced technology demonstration project in addition to other projects.

34. Prior to opposing obvious discrimination, no one interfered with my projects. Those meetings called by Mr. Farley were clearly interfering with my work, unproductive, irrelevant, and were evidence of a pattern of intentional discrimination against my brother and me.

35. At the beginning of Fiscal Year 2001 ("FY2001"), I and the LMS project manager Mr. Bird, discussed and agreed on the plan I proposed; however, Farley escalated discrimination against me requesting details of a formal plan as a pretext to interfere with my work. At a number of meetings, Farley was incompetent to understand the plan and the products for the LMS program as I documented in my e-mail to Mr. King. Instead of resolving the unsatisfactory working conditions or removing Farley for incompetence from the acting branch head position, Mr. King used veiled threat in his reply to my e-mail of 2/26/01 and later asked me not to send e-mails

describing Farley's incompetence and deliberate misrepresentation of facts.

36. As a part of retaliations against my brother Dr. Y. Stoyanov and me for opposing discrimination and unfair treatment, Mr. King and Mr. Farley, interfered with subordinate sponsors of funded work and denied my brother and me incentive pay, assignments and direct work on projects and programs available in the department Code 74 in order to keep us on extended overhead to aggravate harassment and escalate discrimination. Since 1989, my brother and I continuously worked on directly funded projects until Mr. King intentionally discriminated against us in reprisal for opposing obvious discrimination with assignment of incompetent and significantly younger Farley to the acting branch head position.

37. In 2001 at least three new significantly younger similarly situated employees (ND-4 level) with inferior qualifications were hired in Code 741 and provided work on direct funding: Mr. G. Smith, Jr. (DOB 1/73 US born); Mr. Mirotznik (DOB 9/65 US born); and Mr. Stratton (DOB 7/76, US born). In fact, Mirotznik with inferior qualifications was given essentially the same salary which I earned working for the Navy for over 12 years.

38. After opposing discrimination and appealing unfair treatment, Mr. King intentionally isolated and excluded my brother and me from managing projects controlled by Mr. King in Code 74, and denied directly funded work to aggravate harassment and to deny incentive pay demo points. Mr. King accelerated discrimination and in conspiracy with Mr. Davies and Mr. Farley denied me incentive pay points I deserved for the Fiscal Year 2001 (FY01) in spite of outstanding

achievements. Prior to opposing discrimination my brother and I always received at least 3 incentive pay points out of 4 available. Mr. Jebsen in conspiracy with Mr. King, Mr. Davies and Mr. Farley escalated discrimination and denied me incentive pay assigning no (zero) pay points in FY02. In reprisal for opposing discrimination, my brother received no incentive pay points in FY00 and FY01 in spite of outstanding achievements. These incidents establish pattern of discriminatory conduct against my brother and me.

39. On February 4, 2002, I filed first EEO discrimination complaint after Mr. King committed the most egregious act of intentional discrimination against me denying me promotion to the permanent Branch Head position of Code 741 by promoting Mr. Farley with inferior qualifications. The egregious discrimination and fraud with promotion were blatant when Mr. King promoted Mr. Farley with far inferior qualifications than my qualifications because Farley was 14 years younger than I and not born in Russia.

40. Mr. King conspired with Mr. Davies to deny me promotion and to select Mr. Farley. Mr. King intentionally misrepresented facts that selection panel ratings were the key consideration contrary to the fact that the selection panel was to cover up discrimination against me and to promote 32-years old American-born Mr. Farley with inferior qualifications than my qualifications. The selection panel was biased and 5 out of the 6 panel members were current of former subordinates of Mr. King. The subordinate selection panel members were aware of Mr. King's intentions to hire and promote younger employees. The 5 out of the 6 panel members knew that Mr. King wanted to promote Mr. Farley after keeping Farley acting for 22 months. Any reasonable mind can see the contrast in

rating candidates by Mr. King's subordinates and the only independent panel member Mr. Moore who ranked my brother and me much higher than Mr. Farley. In fact, Mr. King did not select the highest ranked candidate (Mr. W. Stephens), but selected the youngest and the least qualified Mr. Farley. Mr. King lied and proffered pretext assigning Mr. Farley qualification, which did not exist.

41. Mr. King lied during the OCI investigation and intentionally misrepresented facts to obstruct and impede official EEO process and to cover up intentional discrimination against me. During deposition, Mr. King committed perjuries and intentionally misrepresented facts. Mr. King lied that Stoyanov isolated himself; lacked understanding of organization, its process and need; did not appreciate how technology influenced Navy ships; work is prone to technical fault; and was not a good communicator. Mr. King conspired with Defendant Caron to commit perjury and had no bases in fact.

42. In addition, Mr. King and Mr. Farley lied that I was unable to maintain projects within budget, did not work well with others and produce timely reports. Contrary to Mr. King and Mr. Farley lying and committing perjuries during OCI investigation and depositions, Mr. Davies recommended me for the position at ONR (Office of Naval Research) stating that my ability to manage and coordinate the technical and administrative aspects of S&T (Science and Technology) and RDT&E (Research, Development, Test & Evaluation) programs and my knowledge, skills, ability, or personal characteristics exceed expectations to such an extent that it warrants special mention for placement consideration. Mr. Davies was my first level supervisor for about 7 years when he

made the recommendation in 2000. In addition, Mr. Davies stated that I have demonstrated the knowledge, skill, ability, or personal characteristics to a degree that is clearly above that expected of a fully competent employee with regard to knowledge of overall Department of the Navy S&T process, knowledge of DOD acquisition process, and ability to communicate technical information in writing and orally in presentations and briefings to flag rank, SES-level and above. For more than 12 years working for the Navy, I always received favorable performance evaluations. In addition, I received performance and service awards for exemplary performance and outstanding achievements.

43. I learned during OCI investigations and depositions that Mr. Caron as the agency representative conspired with Mr. Jebsen, Mr. King, Mr. Davies, Mr. Farley and others to commit perjuries in order to harm me, obstruct and impede official process, and deny my brother and me fair resolution of EEO discrimination complaints. By fraud and intentional misrepresentations Mr. King, Mr. Davies, and Mr. Farley escalated discrimination against my brother and me.

44. On February 21, 2002, after EEO Counselor contacted management about fraudulent promotion of Mr. Farley and prior discrimination against me and my brother Dr. Yuri Stoyanov for denied incentive pay and aggravated harassment, Mr. King in conspiracy with Mr. Farley escalated discrimination and retaliated against us changing our work schedule of the five years under pretext of enforcing "core hours" rule, which was abandoned for more than five years.

45. My brother, Dr. Yuri Stoyanov and I were forced to file additional EEO discrimination complaints when Mr. King in conspiracy with Mr. Davies, Mr. Farley and others escalated discrimination and denied my brother and me promotions, assignments to positions of higher responsibility, and directly funded work as identified in formal EEO discrimination complaints. While the Ship RF department budget increased from $ 9.6 million in FY01 to $ 14.1 Million in FY02, Mr. King deliberately denied me work on directly funded projects under his control in department 74. About one month after my brother and I filed first formal EEO discrimination complaints in March 2002, Mr. King maliciously terminated my brother's 16-year career in the Ship Radar Frequency (RF) technology department 74 and fraudulently transferred him to another technology department 72. My brother and I reported prohibited personnel actions and fraud committed by agency officials Mr. King, Mr. Farley, Mr. Caron and others to the Navy administration EEO Chief and Commander Captain S. Petri, to the Commander of NAVSEA Admiral Balisle, to the Secretary of the Navy Mr. Gordon England and to the Secretary of Defense Mr. D. Rumsfeld.

46. Since June 2002, Mr. G. Jebsen became the Head of Code 70 and in conspiracy with subordinates continued and in fact escalated intentional discrimination against my brother and me. Mr. Jebsen in conspiracy with subordinate management officials and agency representative Mr. D. Caron escalated continuous pattern of discrimination and reprisals in order to harm me and to obstruct and impede official process.

47. Mr. Jebsen in conspiracy with subordinates Mr. King, Mr. Davies, Mr. Farley and other subordinates intentionally denied directly funded work from projects that were available in the Code 74 in order to escalate discrimination, retaliations, create intolerable working conditions, aggravate harassment and find a pretext for disciplinary actions. In fact, Mr. Jebsen continued to deny promotions, positions of higher responsibility, and employment opportunities leading to promotions.

48. Mr. Jebsen in conspiracy with subordinates denied me assignments to work on department largest programs such as Billy Goat and special access projects because of my national origin. As the only two Russian born employees, my brother and I were denied assignments to work on special access projects in spite of superior qualifications, Top Secret security clearance, and experience working in Code 70 for more than 12 years.

49. I was forced to work on extended overhead and was harassed and deliberately assigned tasks incompatible with my work experience, education and position of the Scientist. In order to escalate discrimination and find a pretext for disciplinary action I was intentionally assigned menial and humiliating tasks, such as to do "delivery boy" task, to ride carriage and pull cables.

50. Mr. Jebsen in conspiracy with his subordinates and Mr. Caron escalated continuous discrimination and retaliations against me to obstruct and impede official process and to deny me fair EEO process. Escalated discrimination against me caused severe stress, mental and physical pain and violated my rights. I personally appealed to Mr. Farley, Mr.

Davies, Mr. King, and Mr. Jebsen to stop discrimination against me.

51. Mr. Jebsen denied all my appeals to stop and end blatant discrimination against me and in fact escalated intentional discrimination against me unlawfully and without probable, just or legal cause. Mr. Jebsen and the agency administration were well aware about discrimination against me, however failed to respond immediately and appropriately but intentionally escalated discrimination against me.

52. Mr. Jebsen in conspiracy with his subordinates and Mr. Caron intentionally escalated discrimination as was established during my participation in the EEO Commission hearing. On September 30, 2002, Mr. Jebsen instructed his Deputy Mr. Gerald Smith to escalate discrimination: "It's time to crack down on them [Stoyanovs]...Dave Caron has mentioned it twice now," which undeniably identified conspiracy to escalate discrimination against my brother Dr. Yuri Stoyanov and me. In fact, Mr. Jebsen in conspiracy with subordinates and Mr. Caron intentionally escalated discrimination and denied reasonable official time to prepare EEO discrimination complaints in order to harm me and to obstruct and impede official process.

53. I learned about Mr. Jebsen's intent to continue discrimination and unwillingness to resolve egregious discrimination committed by Mr. King from the email of July 29, 2002, to Mr. King. Mr. Jebsen stated: "I don't like the sound of mediation; implies we have some grounds for compromise." In fact on this same day Mr. Jebsen in conspiracy with Mr. King and Mr. Farley escalated discrimination against me and ordered me to provide daily status reports

summarizing my work. Prior to escalated discrimination against me, employees on unplanned overhead were not required to provide daily report of their activities. I suffered sever anguish and mental pain because of blatant violations of my rights.

54. Discrimination and reprisals against me were blatant and I learned later that Mr. King was willing to offer his own position as the Head of Code 74 to settle egregious discrimination he committed against me. During deposition, however Mr. King lied and committed perjuries denying offer of his position, (King Deposition p. 144-145).

55. The email of July 29, 2002, established direct evidence of Mr. Jebsen's intent to continue intentional discrimination against my brother and me. Mr. Jebsen in conspiracy with subordinates and Mr. Caron intentionally denied me reasonable amount of official time to respond to agency requests and to work on job related EEO complaint preparation for the EEO Commission hearing in order to obstruct and impede official process, escalate discrimination, aggravate harassment, and find a pretext for disciplinary actions.

56. The pattern of intentional discrimination and direct evidence of the conspiracy to escalate discrimination against me was obvious when on the same day of July 29, 2002, Mr. Jebsen in conspiracy with Mr. King, Mr. Davies and Mr. Farley, imposed discriminatory requirement to produce status reports daily when there was no need to be monitored on daily bases. Around the same time, I filed another EEO discrimination complaint and EEO Counselor was contacting responsible management officials that intentionally escalated discrimination against me. Mr. Jebsen in conspiracy with subordinates imposed

discriminatory requirement in reprisal for participation in prior EEO activity as part of continuous discrimination against me on bases of age and national origin. I knew that no other similarly situated employee was required to produce status reports daily, but requirement was imposed only on me to escalate discrimination against me. Mr. Jebsen, Mr. King, Mr. Davies and Mr. Farley abused positions of authority and by fraud discriminated against me.

57. My appeals to Mr. Jebsen to rescind discriminatory requirement was ignored. I knew that agency officials, Mr. Jebsen in conspiracy with his subordinates were looking for an excuse to retaliate and to impose disciplinary actions against me by escalating intentional discrimination and reprisals in an attempt to obfuscate prior egregious discrimination against my brother and me. It was obvious that management officials intentionally violated EEO Commission regulations and Federal laws.

58. These incidents established pattern of continuous discrimination against me. I was denied promotions to ND-5 positions of higher responsibility as part of continuous discrimination on bases of age, national origin, and in reprisal for participation in EEO activity. Mr. Jebsen in conspiracy with subordinates continued discrimination against me and denied me numerous promotions. I identified claims of intentional discrimination as follows:

1) I was continuously denied promotions to ND-5 positions of higher responsibility when at least 9 individuals were promoted without vacancy announcements or by fraud.

2) On February 4, 2002, I was informed that I was denied promotion to the Branch Head position ND-5 position in the Radar Frequency (RF) Technology Branch, Code 741 when Mr. Farley with far inferior qualifications and significantly younger (by 14 years) than I was assigned to the position.

3) In March 2002, I was denied promotion to ND-5 position as part of continuous discrimination when Mr. Russell with inferior qualifications was promoted without vacancy announcement by using fraud under pretext of accretion of duties.

4) In April 2002, I was denied promotion to ND-5 position as part of continuous discrimination against the me and in retaliation for the my participation in EEO activity when Mr. Young with inferior qualifications was promoted using fraud with vacancy announcement by excluding my job series 1310 and hiding the vacancy announcement as Aerospace Engineer, which had nothing to do with the duties for the position.

5) In May 2002, I was denied assignment and promotion to the Chief Scientist position while Mr. Russell with far inferior qualifications was assigned secretly without any vacancy announcement by fraud. Mr. Russell was not a Scientist and was unqualified for the position of the Chief Scientist. The Chief Scientist position was vacant until May 2002. I knew that Mr. Russell had no expertise in electromagnetics or non-acoustic technology. It was obvious to me that Mr. King secretly promoted Mr. Russell to ND-5 level and assigned to the Chief Scientist position without any vacancy announcement discriminating against me on the bases of national origin and age (39 year old Russell

born in VA is 7 years younger than I) and in reprisal for my participation in EEO activity.

6) The claims of intentional discrimination against me with regard to secret fraudulent promotions of Russell, Miller, Mayo, Stephens, Renfro, Vinh, Wilson, Young, Nichols, Honke, were developed by reasonable investigation after filing original complaint in February 2002.

59. Additional allegations of intentional discrimination and retaliations for my participation in EEO activity for denied promotions and assignments to ND-5 positions I summarized in my formal EEO discrimination complaints that are not part of the instant civil action because they either pending appeal to the EEO Commission Office of Federal Operations or investigated by the Department of Defense and pending hearing at the EEO Commission.

60. In addition to denied promotions, Mr. Jebsen in conspiracy with subordinates and Mr. Caron escalated intentional discrimination unlawfully and without probable, just or legal cause to obfuscate egregious discrimination against me with promotions, aggravate harassment, and find a pretext for disciplinary action.

61. I have filed specific EEO discrimination claims with the EEO office since February 2002 as related to the escalation of discrimination. These claims establish evidence and undisputed pattern of intentional discrimination against me:

7) Mr. King retaliated against my brother and me, after we filed the EEO discrimination pre-complaint. Mr. King in conspiracy with Mr. Davies and Mr. Farley intentionally changed my brother's and my work schedule of past five years to escalate

discrimination against us in reprisal for filing EEO discrimination complaint. About five years earlier new flexible policy to arrive to work after 9 am and work 8 or 9 hours was introduced to improve morale of the Carderock employees. Because of heavy traffic, my brother and I had a schedule to arrive to work after 10 am and work until about 7 pm. On February 21, 2002, I had seen Mr. King observing my brother and me arrive to work after 9:00 am. Mr. King was triggered by an opportunity to escalate discrimination, harm and create hardship for my brother and me. I knew that Mr. King was vindictive and in conspiracy with Mr. Davies instructed Mr. Farley to introduce enforcement of the "core hours" rule. Mr. Farley would not do it on his own initiative because he frequently arrived to work after 9:00 am. However, Farley lied during deposition and committed perjury that it was his initiative to enforce "core hours" rule. I also learned that on 2/21/02, the EEO Counselor contacted Farley to investigate EEO discrimination claims my brother and I filed with the agency EEO office. I knew that Mr. King, Mr. Davies, and Mr. Farley were looking for a pretext to impose disciplinary action after my brother and I filed EEO discrimination complaints. My brother and I followed the "core hours rule" in spite of hardship. Mr. King and Mr. Farley denied requests for exception.

8) Mr. King in conspiracy with Mr. Davies and Mr. Farley mismanaged my professional duties and assigned me the task of "an errand boy" on 4/11/02. The "errand boy" task was incompatible with my professional duties but was assigned to find a pretext for disciplinary action if I refused to do it. Mr. King in conspiracy with subordinates intentionally

discriminated against me. I had complied with the orders and accomplished the task.

9) On May 17, 2002, King in conspiracy with Davies and Farley directed me to use 6.1 ILIR project funds mismanaging funding allocation and arbitrarily changing work to sabotage the ILIR project and find a pretext for disciplinary action. I complied with the order and informed Mr. King about Farley's mismanagement of my project. Two days later Farley cancelled purchase of a new computer for me. Farley in conspiracy with Davies and King also denied me travel to the IEEE Symposium in spite of the fact that I needed to attend the IEEE Symposium because of the short-term task King assigned to me on the Billy Goat project.

10) On July 29, 2002, Farley in conspiracy with Jebsen, King, and Davies imposed requirement only on me to provide status reports each day when there was no need to be monitored on daily bases. The work assigned to me and the request for "a written communication that summarizes" my work each day was a pretext for escalated discrimination against me, to aggravate harassment on daily bases and to find an excuse for disciplinary action. I had followed the orders and complied with the discriminatory requirement. I also appealed discriminatory requirement through the chain of command. I was forced to appeal to the administration of the agency EEO Chief and Commander of the Carderock Division Captain Petri. After I appealed to Captain Petri, the discriminatory requirement for daily status reports was rescinded.

11) On September 12, 2002, Mr. King created intolerable working conditions by repeatedly

demanding information about Malibu antenna project that I did not have. I appealed to Mr. Jebsen, however Jebsen in conspiracy with subordinates attempted to find a pretext for disciplinary action using false accusations and threats of insubordination. Mr. King was caught intentionally redirecting $95000.00 my brother received for work on Malibu antenna project. Mr. King in conspiracy with subordinates intentionally denied work to my brother to cover up fraud for transferring him to another technology department after my brother and I filed EEO discrimination complaints. Mr. King lied that Mr. James Wood received the funding for the Malibu antenna project while the document stated that funding was for my brother Dr. Yuri Stoyanov and my brother proposed to do the work. It was obvious that Mr. King intentionally denied work on directly funded projects to escalate discrimination against my brother and me to deny incentive pay and find a pretext for disciplinary action.

12) On September 23, 2002, Farley in conspiracy with Jebsen, King, Davies and Caron requested that I do menial work (such as pulling cable riding a carriage) incompatible with my professional duties. The menial work was assigned to me to escalate discrimination against me in reprisal for filing another EEO discrimination complaint and filing request for a hearing with the EEO Commission. Agency officials attempted to find a pretext for disciplinary action intentionally aggravating harassment by assigning menial work to provoke non-compliance with clearly discriminatory assignments. Mr. Jebsen in conspiracy with Mr. King, Mr. Davies and Mr. Farley intentionally escalated discrimination and fraud to find a pretext

for disciplinary actions as identified in the second EEOC case pending appeal at the EEOC-OFO.
13) On December 9, 2002, Farley in conspiracy with Jebsen, Davies and Caron denied my request for additional time to prepare job related EEO complaints and to respond to the agency request during discovery period. Caron in conspiracy with Jebsen and subordinates intentionally denied reasonable time to prepared EEO discrimination complaints to obstruct and impede official process.
14) On March 5, 2003, Farley in conspiracy with Caron, Jebsen and his subordinates ordered me to be out off the Carderock Division site each day after completing 8 hours of work. Caron in conspiracy with Jebsen and subordinates intentionally escalated discrimination against me to obstruct and impede official process and work on my own time on job related EEO discrimination complaints maliciously denying use of Government facilities and equipment after working hours. I knew that Caron conspired with Jebsen and his subordinates to escalate discrimination and to obstruct and impede official process. Farley confirmed the conspiracy by asking me what have I done to infuriate Caron. On March 5, 2003, my brother and I submitted motion to the EEOC explaining fraud and perjury committed by Mr. King with regard to assignments to the Billy Goat and special access programs when Mr. Caron conspired with Mr. King to commit perjury in order to deny my brother and me discovery of intentional discrimination for denied assignments to Billy Goat and special access programs. These incidents of intentional discrimination establish evidence and pattern of discriminatory conduct by Caron, Jebsen, King, Davies, Farley, and others.

62. These incidents evidence the pattern of intentional discrimination and retaliations against me by considering only accepted claims in the first EEOC case.

63. During the EEO Commission hearing Mr. Jebsen intentionally misrepresented facts and was impeached for lying (Hearing Transcript 7/22/04, p. 226). Mr. King, Mr. Davies, and Mr. Farley were also impeached for lying under oath. I knew that Mr. Farley was not credible and intentionally misrepresented facts observing him since April 2000. Indeed Mr. Farley was not credible and was proved to be not credible during the EEOC Hearing of the first and the second EEOC discrimination cases. In fact, Mr. Farley was impeached for lying during the EEOC hearings in 2003 and 2004. In addition, twice Mr. Farley was found to intentionally discriminate against me in retaliation for my participation in EEO activity in both EEOC cases.

64. I know that Mr. Caron intentionally misrepresented facts and, instigating Mr. Jebsen, Mr. King, Mr. Davies, Mr. Farley, and others to make false and misleading statements, harmed me to cover up intentional discrimination against my brother Dr. Yuri Stoyanov and me. I have informed agency officials, EEO Commission and MSPB that Mr. Caron was intent to obstruct and impede the EEO Commission proceedings by intentionally misrepresenting facts and denying discovery of facts during the EEOC and MSPB hearings. Mr. Caron was removed from the MSPB case after I filed appeal with the MSPB and reported Mr. Caron's criminal conduct. Mr. Caron was removed from representing agency before the MSPB in January 2005.

65. I know that Mr. Jebsen conspired with subordinate management officials and Mr. Caron to maliciously and intentionally abuse supervisory position and disciplinary process against me in order to harm me and intimidate me from asserting my rights against unlawful actions by the management officials using fraud to escalate discrimination against my brother and me on bases of age, national origin, and in reprisal for participation in EEO activity.

66. For more than 12 years I had acceptable performance and outstanding achievements that were deliberately and maliciously maligned by Mr. King, Mr. Davies, Mr. Farley and Mr. Jebsen using fraud, perjuries, and baseless accusations to cover-up their own wrongdoing and violations of EEO Commission regulations and Federal laws.

67. I have suffered and continue to suffer a substantial loss of earnings to which I otherwise would have been entitled, including, but not limited to the loss of salary, incentive pay increases, pension allowances and future earnings.

68. I know that my age and national origin were motivating factors in agency's decision to discriminate against me on account of my age, national origin in reprisal for my participation in EEO activity.

69. As a direct result of intentional discrimination against me by the agency officials, I have suffered severe damages to my reputation and my career. I have also experienced severe physical pain and suffering, mental anguish, and the loss of enjoyment of life's pleasures.

70. I know that the Department of the Navy officials acted willfully and in reckless disregard of my

rights under Title VII and the ADEA intentionally discriminating against me because of my age, national origin, and in reprisal for my participation in EEO discrimination complaint activity and reporting fraud, abuse of authority, deliberate misrepresentation of facts, conspiracy, obstruction of justice and reckless violations of my constitutional rights.

71. As I described above, agency officials Mr. Jebsen, Mr. King, Mr. Davies, Mr. Farley, Mr. Caron and others intentionally deprived me of my constitutional rights and violated civil rights and Federal laws clearly established and well-settled including the civil service laws as set in 5 USC 2302 that forbid personnel actions based on the prohibited personnel practices and the civil service laws as set in 5 USC 2301 requiring that federal personnel management be implemented consistent with the merit system principle.

72. Agency officials denied to me equal employment opportunities on account of my national origin and thereby violated my right to equal employment opportunity as protected by Title VII.

73. Agency officials denied me equal employment opportunities in reprisal for participation in EEO discrimination complaint activity and thereby violated my right to equal employment opportunity as protected by Title VII.

74. Agency officials denied me equal employment opportunities on account of my age and thereby violated my right to equal employment opportunity as protected by the ADEA.

75. The Secretary of Department of the Navy Defendant Gordon England was aware of repeated

incidents of fraud and intentional discrimination against me but failed to properly prosecute, discipline or subject to any sanctions Mr. Jebsen, Mr. King, Mr. Davies, Mr. Farley and Mr. Caron for willful violation of the ADEA and Title VII and the Whistleblower Protection Act. In fact Defendant Gordon England, the Secretary of the Department of the Navy permitted and tolerated a pattern and practice of objectively unreasonable, unjustified, and illegal discrimination prior to and including these depravations of my rights.

76. Mr. Jebsen, Mr. King, Mr. Davies, Mr. Farley conspired to subject me to these deprivations maliciously, intentionally or with a reckless disregard discriminated against me on account of my national origin and age in violation of Federal laws and my right to equal employment opportunity and the Human Rights Law.

77. As a direct and proximate result of the agency officials' willful violation of the ADEA, Title VII, Human Rights Law, and Federal laws I suffered economic damages and losses, including, but not limited to loss of employment and opportunities for employment, lost income, discouragement, embarrassment, emotional distress, severe anxiety, stress, and frustration, physical injury, indignity and reduced quality of life. I have suffered and threatened with further injury that is irreparable in nature.

78. I have suffered severe stress and mental pain from the callous disregard of basic norm and my rights since the agency administration was well aware about discrimination, harassment and hostile work environment, however failed to respond immediately and appropriately but willfully and actively participated in further escalation of discrimination

against me by additional and harsher retaliatory actions and prohibited personnel practice. As a direct and proximate result of the acts and omissions of the agency officials, I suffered severe and permanent damages including but not limited to economic losses, severe pain and suffering, emotional distress, injury to health and reputation, and damages to my career.

79. At all relevant times, agency officials Mr. Jebsen, Mr. King, Mr. Davies, Mr. Farley, Mr. Caron and others knew of the discrimination against me and expressly or implicitly agreed to participate in escalation of discrimination against me on the bases of age, national origin, and in reprisal for participation in EEO complaint activity.

80. I documented in my EEO discrimination complaints and in the OSC disclosure acts that evidence a pattern of conspiracy by the agency officials Mr. Jebsen, Mr. King, Mr. Davies, Mr. Farley, Mr. Caron and others to commit prohibited personnel practice, intentionally discriminate against me subjecting me to deprivation of my rights maliciously, intentionally, vindictively or with a reckless disregard for equal employment opportunity. Each one of these agency officials aided and abetted the unlawful discriminatory polices or practices in willful violation of Title VII of the Civil Rights Act, ADEA, Whistleblower Protection Act, Federal laws, and Human Rights Law. The conduct of these officials was intentional, deliberate, oppressive, and motivated by malice to obstruct and impede official processes to harm me and to cover up violations of laws and deprivation of my rights.

81. Mr. Jebsen, Mr. King, Mr. Davies, Mr. Farley, Mr. Caron abused authority, committed

prohibitive personnel action, misused and interfered with administrative processes, aggravated harassment and willfully inflicted emotional distress, discouragement, embarrassment, severe anxiety, stress, frustration, physical injury, indignity, damages, losses, and reduced quality of life. Agency officials Mr. Jebsen, Mr. King, Mr. Davies, Mr. Farley, Mr. Caron and others used intentional misrepresentations to discriminate against me on account of my national origin, age, and in reprisal for participation in EEO discrimination complaint activity and Whistleblowing activity.

82. At all relevant times, I knew that agency officials adopted and maintained discriminatory policy or practice of denying my brother Dr. Yuri Stoyanov and me opportunity for promotion and assignments leading to promotion on bases of national origin, age, and in reprisal for participation in EEO discrimination complaint activity. I became aware of the agency officials' discriminatory policy or practice as a result of, among other things: (a) experiences in attempting to procure promotion or assignment leading to promotion; (b) knowledge of employees selected for promotion or assignment leading to promotion; (c) fraud with selection process; (d) and use of intentional misrepresentations to cover up discrimination against my brother and me.

83. Agency officials Mr. Jebsen, Mr. King, Mr. Davies, Mr. Farley, Mr. Caron and others made false and misleading statements to cover up discrimination against me. They made these material misrepresentations with the knowledge and intent that the government officials, Department of Defense authorities, and EEO Commission would rely on said statements. They entered into an understanding or

agreement, express or tacit, to participate in a common scheme, plan or design to commit unlawful discrimination and cover up violations of the civil service laws in willful, wanton, gross, and callous disregard for my rights.

84. The incidents and actions described above and in my EEO discrimination complaints establish evidence and pattern of the intentional and malicious discrimination and willful violations of EEO Commission regulations and Federal Laws. The Department of the Navy caused agency officials Mr. Jebsen, Mr. King, Mr. Davies, Mr. Farley, Mr. Caron and others to believe that violations of laws would not be honestly, objectively and properly investigated and they continued to intentionally discriminate against me escalating economic damages and losses, including, but not limited to severe physical pain, mental and emotional damages, and permanent damages to my reputation and further advancement of my career. Mr. Jebsen in conspiracy with subordinates intentionally escalated discrimination against me, aggravated harassment, and by fraud denied me promotions, assignments, and advancement of my career.

85. Mr. Jebsen, Mr. King, Mr. Davies, and Mr. Farley in conspiracy with Mr. Caron maliciously and intentionally abused supervisory position and disciplinary process against me in order to intimidate me from asserting my rights against unlawful actions based on fraud and intentional discrimination against me as part of continuous pattern of discrimination on bases of age, national origin, and in reprisal for participation in EEO activity.

86. As a direct cause of intentional discrimination, I suffered severe deterioration of

health. I have suffered physical and psychological pain during periods of severe anxiety, stress, and frustration at times of intentional and malicious discrimination and harassment.

87. Deliberate and continuous humiliation, harassment, and discrimination against me had escalated in the last five years causing mental anguish, sleeplessness, and frustration that affected my life and was further exacerbated by egregious discrimination of removing me from my position. The severity of harm resulting from the agency discriminatory actions affected my health and well being. Mental and emotional harm suffered through this period have interfered and affected my relationships with family and friends and I had experienced severe physical pain.

88. Mental anguish was further exacerbated by realization that my future was irreparably abridged because of the damages to my reputation, denied opportunities for promotion or even lateral assignments to positions leading to promotions, and removal from Federal service.

89. I have suffered substantial loss in earnings when instead of being promoted to the ND-5 level I was denied every opportunity for promotions and was removed from my position as Scientist. I was denied every opportunity for promotion since I started to participate in the EEO activity and was intentionally discriminated against and removed from Federal service. I was unlawfully removed from my position effective 18 November 2003, as a result of discrimination on the basis of age (48), national origin (born in Russia), and in reprisal for participation in prior EEO and Whistleblowing activities since 2002.

Failure to act by officials who were aware of the discrimination against me and the reckless and callous disregard for my rights and outrageous oppression, fraud, perjuries, intentional misrepresentation of facts, and malice on the part of the agency officials have created most onerous and hostile working conditions I had to endure and suffer.

90. I am 50 years old now and have 18 more years before I can retire at the age of 68, however my reputation is severely damaged and further advancement of my career in the agency has been scuttled. The severe mental stress, pain and anguish I have endured have been caused and directly resulted from unlawful actions and intentional discrimination against me because of my age, national origin, and in retaliation for my participation in EEO activity. I have sustained prolonged emotional distress and mental pain, ongoing severe anxiety, physical pain and suffering coupled with frustration at the persistent and intentional discrimination and retaliations against me.

*I have read the above statement, consisting of 16 pages, and it is true and correct to the best of my knowledge and belief.*

/s/
Aleksandr Stoyanov
7560 Pindell School Road
Fulton, MD 20759
Tel. (301) 604-7615

No. 08-[redacted]95

# In The
# Supreme Court of the United States

ALEKSANDR J. STOYANOV and
YURI J. STOYANOV,
*Petitioners*

v.

DONALD C. WINTER,
SECRETARY OF THE NAVY; ET. AL.,
*Respondents.*

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

## PETITION FOR REHEARING

Aleksandr J. Stoyanov,
Yuri J. Stoyanov
7560 Pindell School Road
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## PETITION FOR REHEARING BY U.S. SUPREME COURT JUDGES

Petitioners Dr. Aleksandr Stoyanov and Dr. Yuri Stoyanov respectfully request that the Supreme Court Justices grant rehearing and a decision on our petition for a writ of certiorari because the lower courts denied us justice and a jury trial on the merits for each Petitioner's case[1]. The October 6, 2008 order denied our petition for a writ of certiorari and failed to take into consideration the gravity of injustice and abuse of discretion committed by the lower courts when decisions were based not on the rule of law and facts, but on the rule of misrepresentations, fraud, and perjuries of Defendants and Defendants' representative. The appeals court for the fourth circuit failed to address any issue raised by Petitioners, but in unpublished opinion affirmed the district court's wrong decision granting summary judgment on the crucial age discrimination claims. As a result, the appeals court sanctioned Defendants' intentional violations of laws, abuse of authority, fraud, and egregious discrimination against Petitioners on the basis of age[2], national origin and reprisal for participation in protected EEO discrimination and Whistleblowing activities. Accordingly, Petitioners respectfully request rehearing of the order denying a petition for a writ of

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[1] There were two separate cases RDB 05-1611 and RDB 05-1567 that were consolidated by the lower court against Petitioners' objections.

[2] The 53-years old Petitioners are twin brothers and U.S. Citizens born in U.S.S.R., filed petition for a writ of certiorari in August 2008. Both were 45 years old when Defendant King declared age discrimination to promote the 29-year old incompetent Defendant Farley in 2000.

certiorari to settle the important question of federal law in this case and restore justice.

The direct evidence of age discrimination against 45 years old Plaintiffs was established considering promotion of the 29 years old incompetent Defendant Farley one month after the 46 years old Defendant King's March 2000 email about distress for being above the average age of 44, "real paucity of employees in the 26 to 36 year age bracket," and "need for fresh ideas and enthusiastic energy of new employees," that was misrepresented by the district court Judge Bennett to deny Petitioners a jury trial. The intentional age discrimination against Petitioners was easy to prove because of direct evidence in the record and the pattern and practice of intentional discrimination against Petitioners when more than ten (10) employees with inferior qualifications were fraudulently and secretly promoted. As the second level supervisor Defendant King intentionally discriminated against the Petitioners by denying promotion, positions of leadership and excluding Petitioners from managing programs of any significance including management of special access projects. See Paper # 27, Plaintiffs' Exhibits (Ps' Ex.) 1 at ¶ 17.

There are over fourteen additional claims of intentional age discrimination with evidence in the record that Defendants violated laws, abused authority, and intentionally retaliated against both Plaintiffs in reprisal for participation in protected EEO discrimination complaint and Whistleblowing activities. Petitioners' timely and well supported motions to Compel Defendants Representative Mr. Sippel to Certify Under Penalty of Perjury the Content of Defendants filings were denied by the

district court Judge Bennett to let Defendants' representative continue misrepresentations so the district court could use deliberate misrepresentations to deny Petitioners a jury trial and grant Defendants' motion for summary judgment. See papers # 15, 19, 20, 25, 30, 34, 35. The district court misconstrued clear evidence of a series of fraudulent and secret promotions of significantly younger employees with inferior qualifications than Plaintiffs' qualifications when Defendant King violated regulations specifically requiring that "The potential for future promotion must be made known to all potential applicants" while fraudulent promotions under the "accretion of duties" were made secretly and unknown to the Plaintiffs or other potential applicants. See Paper #94 and Ps' Ex. 1 at ¶ 28-30, 20, Ps' Ex. 46 (High Grade Promotions Code 70), Ps' Ex. 10, ROI-03 p. 394 (e). In reprisal for Petitioners' filing March 2002 EEO discrimination complaints and filing disclosures with the chain of Navy command, Defendant King retaliated and by fraud transferred Petitioner Dr. Yuri Stoyanov in April 2002 to another technology department and then in conspiracy with other Defendants unlawfully removed Petitioner Dr. Aleksandr Stoyanov from employment and the Scientist position in October 2003.

The appeals court for the fourth circuit affirmed the lower court's abuse of discretion and clearly erroneous decisions based on Defendants' fraud, violations of laws and deliberate misrepresentations while the record and facts identified above and in the informal appeal to the appeals court established direct evidence and the pattern and practice of age discrimination against

Petitioners when significantly (some more than 14 years) younger individuals with inferior qualifications than Plaintiffs' qualifications - were assigned and promoted to higher responsibility positions. The limited discovery was intentionally obstructed by the Defendants' representative and record had not been adequately and properly developed. See paper # 83. During the hearing on 11/7/06, the district court Judge Bennett made contradictory orders to intimidate Plaintiffs and then denied Motions with Request for the Court Reporter to Release Audio Tapes of the Hearing to cover up abuse of discretions and tampering with the transcripts that were modified, words were deleted and replaced to change the meaning of actual statements. See paper # 85.

The appeals court for the fourth circuit failed to render justice, failed to reverse district court's wrong decisions and sanctioned judge Bennett's abuse of discretion and decisions based not on the rule of laws but on the rule of lies, deliberate misrepresentations, fraud, and perjuries of Defendants and Defendants' representative. Accordingly, Petitioners respectfully request rehearing of an order denying a petition for a writ of certiorari because the fourth circuit appeals court decision conflicts and so far departs from this Court's decisions with regard to the controlling effect of an important question:

Whether the appeals court decision sanctioned violations of laws by failing to address any issue raised by Petitioners and affirming lower court decision?

The appeals court for the fourth circuit made intentionally wrong decision clearly in conflict with this Court's decisions related to the Age Discrimination in Employment Act (ADEA) by finding no reversible error in the district court's decision that was based on Defendants' fabrications, fraud, and deliberate misrepresentations of Defendants and Defendants' representative in the motion for summary judgment. As was already presented in the petition for a writ of certiorari, this Court established in *Reeves v. Sanderson Plumbing Products, Inc, 530 U. S. 133, 140 (2000)*, what showing a plaintiff had to make regarding pretext in the age discrimination case and, specifically, whether a plaintiff could satisfy his burden by merely rebutting the defendant's false explanation for the action after establishing strong prima facie case of age discrimination. Petitioners also presented ample evidence of a pattern and practice of age discrimination and direct evidence of the selecting official's fraud, deliberate misrepresentations, perjuries, and discriminatory attitude based on Petitioners' age. In addition, this Court explained in *Watson v. Fort Worth Bank and Trust, 487 U.S. 989 (1988)*, that "[e]mployer's undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination" and the subjective criteria in the selection can have deleterious effects that are indistinguishable from intentionally discriminatory practices that were clearly identified by the Petitioners. Furthermore, this Court has already affirmed on February 21, 2006 in *Ash* v. *Tyson Foods, Inc.*, 126 S. Ct. 1195, that an employee's claimed superior qualifications for the

position sought could show that the employer's articulated reasons were pretextual, which Petitioners explicitly established in Petitioners' Informal Brief to the appeals court and Plaiantiff's Opposition (paper #27) in the district court. However, the appeals court for the fourth circuit ignored these case laws, evidence of intentional discrimination and retaliations, and failed to address any issue raised by the Petitioners in the appeal. Instead, the appeals court for the fourth circuit noted in its decision that "unpublished opinions are not binding precedents in this circuit" thus indirectly admitting that its decision was intentionally wrong.

The credibility of the appeals court for the fourth circuit was severely undermined when its unpublished decision was based on "the reasons stated by the district court" as those reasons clearly contradicted the published decisions of similar cases, undisputed evidence presented in the Petitioners' cases, and intervening decisions of this Court. The appeals court wrong decision in addition to its failure to address any issue raised by Petitioners call for an exercise of this Court's supervisory power to settle the important question of federal law in this case when protections guaranteed by the ADEA remedial legislation were violated and Petitioners denied jury trial. How can Petitioners vindicate by legal means violations of their rights when the appeals court for the fourth circuit failed to address any issue raised by Petitioners in the appeal and issued unpublished opinion to sanction unjust and wrong district court decisions that conflicted and far departed from this Court's decisions and published opinions in similar cases supporting Petitioners? Denial of the petition for a writ of certiorari would further undermine

credibility of the legal process and escalate violations of laws and Petitioners' rights. Accordingly, Petitioners respectfully request rehearing of the order denying a petition for a writ of certiorari to settle the important question of federal law in this case and restore justice.

Petitioners appealed to look at the Defendants' violations of laws and violations of Petitioners' rights, however, the appeals court affirmed the district court's wrong decisions that far departed from this Court decisions with regard to the crucial issue of age discrimination. Petitioners were harmed and denied jury trial because district court fragmented claims and made piecemeal rulings and decisions based not on the rule of law and facts but on the rule of lies, fraud, perjuries and deliberate violations of laws and Plaintiffs' rights. The October 6, 2008 order denying petition for a writ of certiorari further undermined protections guaranteed by the ADEA and asserted by Petitioners through legal means. Consequently, Petitioners respectfully request rehearing of a petition for a writ of certiorari to exercise this Court's supervisory power and restore justice.

Wherefore, in consideration of the above, the petition for a writ of certiorari should be granted to restore justice and settle the important question of federal law in this case.

Respectfully submitted,

Aleksandr Stoyanov Yuri Stoyanov

Dr. Aleksandr Stoyanov, Dr. Yuri Stoyanov

## CERTIFICATE OF COMPLIANCE WITH THE REQUIREMENTS

1. This Petition for Rehearing complies with the Supreme Court Rule 44 (1) that it is presented in good faith and not for delay.

2. This Petition for Rehearing contains 1655 words typeset in the Century Schoolbook 12-point type font, excluding the parts of the petition exempted by the Rules.

3. This Petition for Rehearing complies with the Rule 44 (2) that it is restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

Aleksandr Stoyanov

Aleksandr J. Stoyanov

Yuri Stoyanov

Yuri J. Stoyanov